S. HRG. 111–679, Pt. 3

DEEPWATER HORIZON LIABILITY

HEARING

BEFORE THE

COMMITTEE ON ENERGY AND NATURAL RESOURCES UNITED STATES SENATE

ONE HUNDRED ELEVENTH CONGRESS

SECOND SESSION

TO

RECEIVE TESTIMONY ON THE LIABILITY AND FINANCIAL RESPONSIBILITY ISSUES RELATED TO OFFSHORE OIL PRODUCTION, INCLUDING THE DEEPWATER HORIZON ACCIDENT IN THE GULF OF MEXICO, INCLUDING S. 3346, A BILL TO INCREASE THE LIMITS ON LIABILITY UNDER THE OUTER CONTINENTAL SHELF LANDS ACT

MAY 25, 2010

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DEEPWATER HORIZON LIABILITY

TUESDAY, MAY 25, 2010

U.S. SENATE,
COMMITTEE ON ENERGY AND NATURAL RESOURCES,
Washington, DC.

The committee met, pursuant to notice, at 10:08 a.m. in room SR–325, Russell Senate Office Building, Hon. Jeff Bingaman, chairman, presiding.

OPENING STATEMENT OF HON. JEFF BINGAMAN, U.S. SENATOR FROM NEW MEXICO

The CHAIRMAN. The hearing will come to order.

Today is the third hearing of this committee on issues related to the Deepwater Horizon disaster in the Gulf of Mexico. While today's hearing will focus on liability and financial issues, we continue to have foremost in our minds the human component of this accident, the 11 rig workers who lost their lives, their families, the people of the Gulf who are experiencing this catastrophic situation firsthand.

Yesterday, I was fortunate to accompany our Assistant Majority Leader, Dick Durbin, and Senator Murkowski, Senator Landrieu, Senator Whitehouse, Senator Vitter—all of us spent the day in the Gulf observing the consequences of this accident and the joint response of our government agencies, NPB, and the many volunteers.

It's a sobering reality to see oil begin to impact the shorelines and know that this well is not yet under control. However, I also saw many people who have been working night and day for weeks to fight this spill and to protect the Gulf, and I think we all express our gratitude to them for their extraordinary effort.

Today, we examine the liability, financial, responsibility, and penalty provisions of the law related to this accident. This is— there is urgency in our effort. We need to ensure that those harmed by this accident are fully compensated and that a system is in place that properly allocates risks and losses. Based on what I've learned so far, I believe that we have a system in dire need of repair. Current law caps the responsible party's damages, other than the cleanup cost, at $75 million, which clearly is nowhere near the damages that result—have resulted from this disaster.

Equally as troubling, the law requires the Secretary of Interior to adjust the amount of these caps at least every 3 years to reflect significant increases in the Consumer Price Index. Yet, the limit on damages for offshore facilities has not been increased since the law was passed in 1990. Twenty years of inflation have been ignored.

Victims of the disaster will certainly wonder why there should be any cap on damages, and why those responsible should not simply be required to pay the full amount of the harm they caused. BP has stated that it will pay all legitimate claims and that it will not insist on the $75-million cap currently in the law. But, even accepting this as true, we have a broken system that is in need of repair. The Oil Spill Liability Trust Fund financed almost—financed mostly by taxes on oil, is intended to cover higher levels of damages and to spread the risk of excess damages among the industry as a whole. Yet, it is limited to paying $1 billion per incident. Congress, over the years, has been inconsistent in acting taxes to fund this effort, and the taxes that support it are scheduled to expire in 2017. So, we obviously need to look at that, as well.

The law also requires that operators in the offshore environment demonstrate certain levels of financial responsibility to ensure that they can cover the losses that they may cause. However, for facilities like the Deepwater Horizon, the maximum amount required is $150 million and the standard requirement is only $35 million. This amount has not been increased in decades. We obviously need to fix this.

Finally, there are civil and criminal penalties available to the Secretary to punish those who violate safety and other requirements. These are intended to be a deterrent to playing fast and loose with the rules and creating safety risks. But the civil penalties were set in 1990, at $20,000 a day. They've been raised only once, to $35,000 a day. Here, too, the law requires the Secretary to adjust these penalties every 3 years to reflect increases in the Consumer Price Index, and that has only occurred sporadically.

So, we have our work cut out for us. These are complex areas of law and policy. We have a number of experts here to help us think through how to fix these problems, and I look forward to their testimony.

I know Senator Whitehouse is here to speak briefly about his legislation that he's introduced regarding civil and criminal penalties, but before calling on him, let me call on Senator Murkowski for her statement.

STATEMENT OF HON. LISA MURKOWSKI, U.S. SENATOR FROM ALASKA

Senator MURKOWSKI. Thank you, Mr. Chairman. I want to thank you for agreeing to hold this very important hearing this morning.

As you have mentioned in your statement, our visit yesterday to the Gulf, that Senator Whitehouse and Senator Landrieu and several others joined us on, I think, was a very important visit, a very important trip to understand the impact of the Deepwater Horizon spill, understand better the consequences as that spill unfolds as we see the impact to local residents, certainly to the marine environment. I can assure you that what I saw yesterday certainly has reinforced my commitment to help make things right for all those, whose lives and their livelihoods are being so vastly affected by this disaster.

When it comes to the issue of liability associated with a major oil spill, I don't think that there's any State that's represented here on this committee that has a more direct experience, certainly a more immediate concern, than the State of Alaska.

When the Exxon Valdez tragedy occurred, it was a horrible incident at that time. It was a long and very sad part of Alaska's history. The litigation that followed was years in being resolved. The litigation over punitive damages literally took 2 decades to resolve. That, and—in and of itself, was an absolute tragedy, and I am committed to ensuring that we don't see a similar situation unfold with this Gulf spill.

Now, I wanted our committee to hold this hearing because there's been considerable discussion about the liability for the Deepwater Horizon spill, and what part of that liability is limited or not limited. I think there has been some mischaracterization out there that BP is only going to be responsible for $75 million of the spill.

Mr. Chairman, if I really thought that the Federal Government was going to protect companies that have billions of dollars in assets, and then require that they only pay $75 million, regardless of the ultimate costs and damages for the spill, with taxpayers and spill victims that could possibly then be hung out to dry, I would be the absolute first to introduce legislation to correct what would clearly be a flawed system. The reality is, is that this $75 million figure is drawn from just one provision on strict liability in OPA, the Oil Pollution Act, and it has nothing to do with the expressly unlimited—the unlimited liability provided for the cleanup costs. I think it's also important to recognize that it has nothing to do with the law's authorization for unlimited damages that are allowed under various State laws. We recognize that not every State has unlimited strict liability, so we do need to take that into account.

I think, we have all stated around this table here, in this committee room, with the CEO of BP in front of us, that we must hold, and we will hold, BP accountable.

Mr. Chairman, you have stated, and repeated again the affirmation that was made by BP, that they will—they will pay for and provide for all of those costs that are incurred as a result of this oil spill.

When we were in the Gulf yesterday with Secretary Napolitano and Secretary Salazar, they, too, reiterated, many, many times throughout the course of the day, that BP will be responsible for the damages—for the costs associated with the spill.

I think that we need to listen carefully and constructively on how we hold companies liable, how we incentivize stronger safety and environmental safeguards as it pertains to the $75–million liability cap. My own opinion is that we need to increase this liability cap to reflect both the inflation, the changing financial and the risk portfolios that are associated with certain types of exploration. I hope that, as we consider some of the suggestions here today, and going out into the future here, we consider how we make changes in ways that are not arbitrary. Right now there's a proposal out there that the liability cap needs to be $10 billion. Is that the right figure? I don't know. Maybe it is. Maybe it needs to be higher. Maybe it needs to be unlimited. Maybe it needs to be somewhere in between. But, I think we need to make the time, take the time, to ensure that you're building good policy on this.

If Congress decides to impose a strict and direct liability of an additional $10 billion on top of the unlimited cleanup and the unlimited lawsuits that can be brought about—against responsible parties in State courts, I think we have to consider what the potential consequences might be. Will there be jobs lost? Particularly in the Gulf Coast, our energy's—Nation's—our energy security, perhaps, weakened. We need to be considering these aspects. We've got an interest in making sure that the victims of this tragic spill, and, God forbid, that any future spills, are justly compensated in a fair and an expeditious manner.

I think it is important that we figure out how we deal with this liability cap in increasing it, but again, I'm reserving judgment on what that appropriate figure might be until we've examined this in a way that Secretary Salazar asked us to do just last week.

So, I welcome the witnesses that we will have today. I welcome Senator Whitehouse for his perspective.

I thank you, Mr. Chairman, for your leadership on this issue.

The CHAIRMAN. Thank you very much.

Senator Whitehouse has introduced legislation, S. 3346, to revise the civil and criminal penalty provisions. We welcome him to the committee to make a statement about that bill.

Go right ahead.

STATEMENT OF HON. SHELDON WHITEHOUSE, U.S. SENATOR FROM RHODE ISLAND

Senator WHITEHOUSE. Thank you, Chairman Bingaman.

Thank you, Ranking Member Murkowski and members of the Energy and Natural Resources Committee.

First of all, thank you for holding this hearing. I encourage you to review the penalty and liability framework governing offshore drilling and enact changes to this framework so we can prevent future disasters, like the one now unfolding in the Gulf.

Thank you also for inviting me to make a few remarks about my Outer Continental Shelf Lands Act's amendments of 2010 bill, S. 3346. The bill seeks to enhance penalties for failing to meet worker safety and environmental regulations on offshore oil rigs. It is just one piece of the puzzle.

My colleague Senator Menendez has introduced 2 other bills to raise liability caps for oil spills when they occur and to eliminate the per-incident cap on claims to the Oil Spill Liability Trust Fund. I'm a cosponsor of both of these bills and commend Senator Menendez's leadership on this issue. I look forward to working with him, and all of my colleagues in the Senate, to forge a strong deterrence system to discourage irresponsible oil drilling.

Just yesterday, as the Chairman has indicated, we visited Louisiana—the Chairman, the Ranking Member, Senator Landrieu, Senator Durbin, and others—to inspect the disaster caused by the BP Deepwater Horizon oil spill. Since the tragic explosion on this oil rig on the night of April 20, which took the lives of 11 workers, oil from Mississippi Canyon Block 252 has been spewing uncontrollably into the deep waters of the Gulf, at a rate that no one seems able to accurately calculate, and that has very likely been underestimated.

I knew the extent of the spill from press reports, but it is another thing entirely to go and see the massive oil slick spread across the surface of the Gulf, with black smoke billowing off of the waters where controlled burns are taking place. Oil is now also washing up on coastal beaches and wetlands, areas vital to the economies of Louisiana, Mississippi, Alabama, and Florida.

While in the Gulf, we also heard from shrimpers and other Gulf fishermen about the destruction of the ecosystem and the potential collapse of their industries. Some of these folks are second-and third-generation fishermen. This is literally the only life they have ever known, and they worry it could be gone forever. Rhode Island fishermen face similar worries at home, more based on economic concerns than on oil spills. But, I'm sympathetic to the concerns of our fishing community, and this fishing community.

S. 3346 would amend the Outer Continental Shelf Lands Act by enhancing penalties in the following 3 ways: increasing civil penalties from $38,000 per violation to $70,000 per violation, per day. Two, where the violation constitutes a threat of serious, irreparable, or immediate harm or damage to life, including fish and other aquatic life, property, any mineral deposit, or the marine, coastal, or human environment, increase civil penalties from $38,000 per violation, per day, to $150,000 per violation, per day. Three, increase the upper bound of criminal penalties from $100,000 per violation, per day, to $10 million per violation, per day.

The goal of the Outer Continental Shelf Penalties Program is to assure safe and environmentally sound oil and gas operations on the Outer Continental Shelf. Enhancing these penalties will go a long way to deter oil companies from cutting corners on safety measures that can prevent disasters like the Gulf spill.

We need to take a comprehensive look at the penalty and liability framework that governs offshore oil and gas drilling and the substantive requirements that exist to protect our workers, our coastlines, and the marine environment from devastating oil spills.

We may want to consider banning drilling at certain depths until it's clear that we can engage in repair and recovery activities at those depths.

Chairman Bingaman, I applaud your efforts to address the liability portion of this work in today's hearing. One thing I'm certain of is that the current penalty and liability system is inadequate. In just the first 3 months of this year, the five largest oil companies worldwide, including BP, made $23 billion in profits. The current liability and penalty limits are inconsequential in the face of those recordbreaking profits.

I want to close by anticipating an argument we will hear from the oil and gas industry, that enhancing penalties will drive companies out of the business of offshore drilling. The way I see it, robust safety and environmental standards, and tough penalties for noncompliance with those standards, help to avoid disasters like the BP Deepwater Horizon oil spill. Not only will it save workers' lives and protect our marine and coastal environments, but this will save money, because these disasters cost many times more than the cost of prevention.

Just consider these costs. In the 1996 North Cape Scandia spill off the coast of Rhode Island, cleanup costs, natural resource damages, and penalties totaled almost $32 million. In the 1989 World Prodigy Spill at Brenton Reef, Rhode Island, cleanup costs and fines exceeded $35 million. Rough estimates of the cleanup costs for Deepwater Horizon's bill range from $2 billion to $8 billion. Suddenly, $75,000 or $150,000 doesn't seem like such a very large number.

Mr. Chairman, I'd like to offer into the record of these proceedings a list of some of BP's violations of Outer Continental Shelf Lands Act regulations, taken from the MMS Web site. These are exactly the types of safety systems that failed on April 20. May I ask consent to have that submitted for the record?

The CHAIRMAN. We're glad to have that included.

Senator WHITEHOUSE. I appreciate the attention of the committee. I thank you and your good work.

The CHAIRMAN. Thank you for testifying and your leadership in introducing the bill that you've put forward.

We have 2 panels.

We will excuse you at this point.

We have 2 panels, today, of experts, first from the administration and then from the Congressional Research Service.

The first panel is Thomas Perrelli, who is the associate attorney general; second, David Hayes, who is the Deputy Secretary of Interior; and third, is Craig Bennett, who is director of the Coast Guard's National Pollution Funds Center. If they would all come forward, please, and take their seats.

If there is no particular preference on your part, why don't we start with Mr. Perrelli. If you could give us your views in the first 5 or 6 minutes, and then we will include all of the statements in full in the record, and then we'll have questions.

Mr. Perrelli, go right ahead.

STATEMENT OF THOMAS J. PERRELLI, ASSOCIATE ATTORNEY GENERAL, DEPARTMENT OF JUSTICE

Mr. PERRELLI. Thank you Chairman Bingaman and Ranking Member Murkowski for the opportunity to testify about issues of liability and financial responsibility related to offshore oil production.

Before I begin, I would like to echo the Chairman's sentiments and take a moment to express my condolences to the families of those who lost their lives, and to those who were injured, in the explosion and sinking of the Deepwater Horizon.

The explosion and fire that took place aboard the Deepwater Horizon and the spill of oil that followed have created a potentially unprecedented environmental disaster for the people and fragile ecosystems of the Gulf Coast. This disaster has been met with a massive and coordinated response from the Federal Government, led by President Obama. The agencies operating as a part of the unified command and numerous dedicated Federal officials have been on the scene from the beginning. The activities have been focused, as they must be, on stopping the oil spill and preventing and mitigating its effects.

The Department of Justice, too, has been fully engaged in these response efforts. Our mandate is to make sure that we recover every dime of taxpayer funds that the United States spends for the removal efforts and damages caused by this catastrophe. We have been working tirelessly, and will continue to do so, to carry out this mandate and ensure that the American people do not pay for any of the damages for which others are responsible.

At the direction of the Attorney General, we have been monitoring the situation on the ground, coordinating our efforts with the State attorneys general, and working with Federal partner agencies and natural resources trustees to make sure that we measure and track every bit of cost incurred in damages to the United States, the States, and the environment. We are looking ahead to issues of financial responsibility and liability, many of which arise under the Oil Pollution Act, which is the subject of my testimony today.

As you know, OPA was passed in the wake of the Exxon Valdez disaster to provide specific legal authority for dealing with the consequences of oil spills. OPA gives Federal officials the authority to designate responsible parties who, first and foremost, are required to clean up oil spills and then pay removal costs and damages. The Coast Guard has, thus far, designated BP and TransOcean as responsible parties for this bill, under OPA.

In its current form, OPA contains conditional caps that, in some instances, limit the liability of responsible parties, caps which are based on the size and nature of the vessel or facility that is the source of the spill. BP has already stated in several fora, however, that it will not seek to limit its payments to the applicable cap, and that it will not look to the Federal Government to reimburse it for claims that it pays in excess of the applicable cap. We expect BP to uphold this commitment.

The U.S. Government is committed to making sure that all responsible parties, in any oil spill, are held fully accountable for the costs and the damages they have imposed on our people, our communities, and our natural resources.

The liability provisions of OPA have not been updated in some time, and it is clear that they need to be revised to better reflect the principle that polluters should bear the risks, costs, and damages associated with the harm they caused to individuals, communities, and the natural environment. BP has recognized its obligation to fully compensate all those suffering damages in the current oil spill.

For the future, we need to change the legal framework to ensure that there is no arbitrary cap on corporate responsibility for a similar major oil spill. We'll work with Congress to develop appropriate proposals and transitions.

Thank you, Mr. Chairman.

[The prepared statement of Perrelli follows:]

STATEMENT OF THOMAS J. PERRELLI, ASSOCIATE ATTORNEY GENERAL, DEPARTMENT OF JUSTICE

Chairman Bingaman, Ranking Member Murkowski, and members of the Committee, thank you for the opportunity to testify today about liability and financial responsibility issues related to offshore oil production. Before I begin, I would like to take a moment to express my condolences to the families of those who lost their lives and to those who were injured in the explosion and sinking of the Deepwater Horizon.

INTRODUCTION

The explosion and fire that took place aboard the Deepwater Horizon Mobile Offshore Drilling Unit on April 20th and the spill of oil into the Gulf of Mexico that followed have created a potentially unprecedented environmental disaster for the people and fragile ecosystems of the Gulf Coast. President Obama, the Department of Justice, and the entire Administration are committed to ensuring that those responsible for this tragic series of events are held fully accountable.

From the moment these events began to unfold, this matter has had the close attention of Attorney General Holder. While Administration efforts have focused on responding to the disaster and ensuring that the responsible parties stop the discharge, remove the oil, and pay for all costs and damages, the Department of Justice has been carefully monitoring events on the 2 ground and providing legal support to the agencies involved in the response efforts. To handle the multiple legal issues that a disaster of this magnitude raises, the Attorney General has assembled a team of attorneys from our Civil and Environment and Natural Resource Divisions who have experience with the legal issues that arise out of oil spills and other environmental disasters, as well as the United States Attorneys for the districts that are being, or are likely to be, affected by the spill. The United States Attorneys are on the frontline and have critically important knowledge of their communities and local matters. We at the Department of Justice are working to coordinate our efforts not only with the other federal agencies involved but also with the state Attorneys General for the affected states and with representatives from local communities.

My testimony today will focus on the Oil Pollution Act of 1990, or "OPA." As you know, OPA was passed in the wake of the Exxon Valdez disaster to provide specific legal authority for dealing with the consequences of oil spills. OPA assigns responsibility and liability for cleaning up such spills. It also provides a liability scheme for payment of damages ranging from the immediate and ongoing economic harm that individuals and communities suffer to the potentially devastating and long-term harm done to precious natural resources.

Although OPA is the primary federal vehicle for addressing liability for response costs and damages resulting from oil spills, it is not the only legal vehicle for seeking compensation for incidents such as those now unfolding in the Gulf. It is important to remember that OPA expressly preserves state and other federal mechanisms for pursuing damages for injuries caused by such incidents and for assessing penalties for the underlying conduct that may cause such disasters. There may be additional legal authorities available under both state and federal law, but the focus of my testimony today is OPA.

I assure you that this Administration will explore all legal avenues to make sure that those responsible for this disaster pay for all of the devastation that they have caused. Our mandate is to make sure that we recover every dime that the United States Government spends for the removal of the oil and the damages caused by this catastrophe. We will work tirelessly to carry out that mandate and to ensure that the American people do not pay for any of the costs and damages for which others are responsible.

THE OIL POLLUTION ACT OF 1990

OPA provides a strict-liability scheme for payment of removal costs and damages resulting from a discharge of oil from a vessel or facility into or upon the waters of the United States, including the area in which the Deepwater Horizon explosion, fire, and oil spill occurred. That means that those companies that are "responsible parties" under OPA are responsible for paying costs and damages under the statute, regardless of whether they are found to be at fault. Here, under OPA, the Coast Guard has designated the source of the spill and has thus far identified BP and Transocean as responsible parties under the statute.

OPA establishes certain limits on liability according to a formula that varies based on the size and nature of the vessel or facility that is the source of the spill. For discharges of oil from an offshore facility (other than a deepwater port), a responsible party is liable for all removal costs: There is no cap on such a responsible party's liability for removal costs. OPA defines removal costs as the costs of removing spilled oil from water and shorelines or taking other actions as may be necessary to minimize or mitigate damage to the public health or welfare, including wildlife and public and private property. The responsible party must pay in full for the removal costs incurred by the United States, a state, or an Indian tribe, or by a private party acting in accordance with the National Contingency Plan.

In addition to being responsible for all removal costs, a party responsible for a discharge of oil from an offshore facility is also liable for damages from the spill. With recognized exceptions, a responsible party's liability for damages for a discharge of oil from an offshore facility is limited to $75,000,000 per incident. The liability cap does not apply if the discharge was caused by the gross negligence or willful misconduct of the responsible party or of any of its agents, employees, or contractors. Similarly, no liability cap applies if the spill resulted from the responsible party's—or its agent's, employee's, or contractor's—violation of an applicable Federal safety, construction, or operating regulation. Under such circumstances, a responsible party would be strictly liable for all damages covered by the statute. Recoverable damages cover, among other things, injuries to natural resources, loss of subsistence use of such resources, destruction of property, loss of tax revenue, loss of profits or earning capacity, and net increased costs for additional public services, including protection from fire, safety, or health hazards.

I note that BP has stated in Congressional testimony—including Lamar McKay's testimony before this Committee on May 11—that it will not use the $75 million cap to limit its payment of legitimate claims under OPA. We expect BP to uphold this commitment. Rest assured, however, that the United States Government is committed to making sure that all responsible parties are held fully accountable for all the costs and damages they have imposed on our people, our communities, and our precious resources.

In addition, under OPA, the Oil Spill Liability Trust Fund is available to pay compensation for removal costs and damages to the extent that a responsible party does not do so. The Fund is financed primarily by an 8 cent per barrel tax on oil collected from the oil industry. For any one oil-pollution incident, the Fund may pay up to $1 billion or the balance of the Fund, whichever is less. Natural resource damage assessments and claims in connection with a single incident are limited to $500 million of that $1 billion. If the Fund pays compensation to a claimant, it becomes subrogated to all that claimant's rights to recover from the responsible party under OPA or from any party under any other law. That is, the Fund steps into the shoes of claimants that the Fund pays and assumes any rights of action that the claimants would otherwise have.

PROPOSED AMENDMENTS TO OIL POLLUTION ACT

As you know, the President recently sent up a legislative proposal designed to improve our ability to respond to oil spills. The proposal requested additional funding for many of the agencies that are responding to the present unprecedented oil spill.

Of more direct relevance to this hearing, the proposal would do two things: First, it would raise the potential cap on damages for responsible parties beyond the current limits. Second, it would increase the amount in the Oil Spill Liability Trust Fund by increasing the tax on industry through which the Fund is financed and would increase the amount the Fund could pay for cleanup and damages related to any given incident.

The Administration supports a significant increase in liability for offshore oil and gas developers whose actions pollute our oceans and coastlines and threaten our wildlife and other natural resources. There are a number of factors to consider in increasing the liability caps. We must determine how to ensure that the liability rules provide the appropriate incentive for companies working in this field to fully account for the damages their actions may cause and to mitigate the risks of a catastrophic event. We must consider how best to ensure that the liability rules we adopt provide confidence that an individual or business harmed by an oil spill will be able to seek—and receive—fair compensation, and that the trustees charged with protecting our precious natural resources can secure adequate compensation for any harm done to those resources. In addition, we must consider the ways in which new liability rules may affect the structure of the offshore oil industry and the number of market participants. We must analyze how any change in the caps will interact with the current liability structure under OPA. Under that structure, the party responsible for a spill is liable for associated costs and damages up to a specified cap, if the cap applies, with liability for additional costs and damages spread across the oil industry as a whole through the Oil Spill Liability Trust Fund.

The Administration's proposal to increase the applicable liability caps would apply to any party found to be liable under OPA for any incident that occurred prior to enactment of the new liability caps. The Administration believes it is both fair and constitutional to enact legislation that would ensure that those who have caused environmental damage are held responsible for the damages they caused rather than imposing these costs on society more generally.

Our experiences over the last twenty years, and with the current disastrous chain of events, have convinced us that the old liability caps are simply inadequate to deal with the potentially catastrophic consequences of oil spills. We look forward to working with you to fix these caps.

CONCLUSION

The focus of everyone's efforts right now is—and should be—on ensuring that BP stops the discharge of oil and responds to the immediate aftermath of the spill.

The review of the facts regarding the Deepwater Horizon explosion, fire, and oil spill is still in its infancy. It would be premature to speculate as to the level of damages here or how much any responsible party will be liable to pay.

The Department strongly supports the Administration's legislative proposal and we look forward to working with you to see it adopted.

The CHAIRMAN. Mr. Hayes, we're glad to have you before the committee. Go right ahead.

STATEMENT OF DAVID J. HAYES, DEPUTY SECRETARY, DEPARTMENT OF THE INTERIOR

Mr. HAYES. Thank you, Mr. Chairman and members of the committee.

I'll make a few oral remarks, my written testimony is for the record, thank you.

I've been asked to focus my testimony on the enforcement authority under the Outer Continental Shelf Lands Act, the companion to what Mr. Perrelli is talking about, in terms of the Oil Pollution Act. I'm delighted to testify on this subject. Obviously, our first focus right now is on the oil spill disaster and the response to it. Secretary Salazar sent me down to the Gulf the first—the morning after. I know several of you visited with Secretary Salazar and Napolitano yesterday, and he reported this morning that it was an excellent trip and was delighted you were able to go.

Now, while our primary focus is on the disaster and responding to it, it's appropriate, we believe, that you are, obviously, taking up these broad policy questions. We are also looking at important policy questions regarding this disaster and how to respond to it. It's for those reasons that Secretary Salazar commissioned an independent root-cause analysis, to be done by the National Academy of Engineering, that will be folded into the new Presidential commission that will examine all aspects of this disaster and come up with new proposals, potentially, on how to ensure it will not occur again.

Also, Secretary Salazar will be delivering to the President, later this week, an interim-measures report to deal with safety issues associated with ongoing activities on the Outer Continental Shelf. Most notably and important to this committee is the fact that the Secretary has reorganized the Minerals Management Service, already, to take apart the enforcement side away from the leasing and permitting side. He also, in his reorganization, removed the revenue-producing side from those 2 organizations. So, we look forward to working with you on those issues.

With regard to inspections and enforcement, this has been an—of very significant interest of the Secretaries. In fact, last fall, the Secretary commissioned a unit of the National Academy of Sciences to take a stem-to-stern look, if you will, at the inspection program of MMS. That National Academy study is ongoing, and we're looking forward to the results.

On the precise issue raised by Senator Whitehouse's proposed testimony, we agree that it's appropriate to revisit whether the statutory penalties under the Outer Continental Shelf Lands Act are adequate or not. We note, of course, the additional liability scheme that Mr. Perrelli focused on under the Oil Pollution Act, but certainly the Outer Continental Shelf Lands Act is the primary enforcement mechanism for ongoing review and approval—and, if necessary, compliance—for the oil and gas industry, in terms of offshore activities that the Department of the Interior has purview over.

In that regard, I note that the original penalty authority came from the 1978 Lands Act amendments, and the original fine was 10,000 per day, per violation. In the 1990 Oil Pollution Act, there was an amendment to the Outer Continental Shelf Lands Act that increased that fine for civil penalties to $20,000 per day, per violation. Plus, it established the ability to adjust that upward under the Consumer Price Index. In 1997, MMS revised the penalty amount up, under the CPI, to $25,000 a day. In 2003, it was again revised up, because of the CPI, to $30,000 a day. In 2007, it was again revised up to $35,000 per day. In August of last year, MMS did it—the latest CPI analysis, and the CPI had not gone over the threshold to raise it further. So, there has been attention on this issue, but we are based on a statutory structure that's been in place for some time.

As the administration, we are absolutely open to considering amendments to the Act to increase the current $35-per day, per violation, civil penalty and the $100,000 criminal penalty. We look forward to working with the committee on those issues.

Thank you.

[The prepared statement of Mr. Hayes follows:]

STATEMENT OF DAVID J. HAYES, DEPUTY SECRETARY, DEPARTMENT OF THE INTERIOR

Thank you, Chairman Bingaman, Ranking Member Murkowski, and Members of the Committee, for the opportunity to discuss liability, enforcement, and financial responsibility issues related to oil production on the Outer Continental Shelf, including those associated with the ongoing response to the Deepwater Horizon rig explosion.

Before we begin let me express my sympathy to the families of those who lost their lives and the many who were injured or have lost their livelihood in this massive environmental disaster. This spill continues to command our time and resources at the Department of the Interior as we work to ensure that the spill is stopped; that those responsible are held accountable; and that the natural resources along the Gulf Coast are protected and restored.

Introduction

Secretary Salazar said when he appeared before you last week that we at the Department have been actively and aggressively engaged in this spill from day one. The Secretary has been to the Gulf Coast and Houston many times to ensure all that can be done to stop the spill is being done; to monitor the effects of the spill on our lands and waters in the Gulf; and to direct the Department's response to this tragedy.

I left for the Gulf the morning after the explosion to help provide senior, on-the-ground leadership and communication with principals in Washington. Working with Rear Admiral Landry, we stood up a Joint Command structure in those early days, and moved from a search and rescue effort to a spill response effort. I have continued to be involved in the response to this disaster each and every day from April 20 forward. I have returned to the Gulf twice since that initial trip, and I am working virtually around the clock on Gulf-related response activities, coordinating our

Department's efforts in responding to the spill, both in terms of capping the well, and in working to protect our trust resources from damage from the spill.

The Secretary has detailed the many actions that we have taken in response to the explosion and spill and the major changes that we have been making at the Minerals Management Service—not just over the past 5 weeks, but over the past 16 months—to address prior ethics issues, strengthen its independence, balance its mission, increase safety, and improve management, regulation, and oversight of operations on the Outer Continental Shelf (OCS). This kind of fundamental change does not always come easily or instantaneously, but we have been committed to a reform agenda in the Department since our arrival a little more than a year ago, and we are determined to see it through.

The latest manifestation of these reforms, the reorganization of MMS, was announced by the Secretary last week. The Secretarial Order released last week creates three separate entities within the Department to address the three distinct and conflicting missions of the MMS—safety and enforcement, energy development, and revenue collection. We will be consulting with Congress as we work out the details of this reorganization. The result will be a strong and independent framework that will hold energy companies accountable and in compliance with the law of the land.

Those Responsible Will Be Accountable

We are here today to address issues of liability and enforcement as it pertains to oil and gas development on the OCS. Let me begin by noting that the President has been very clear in this regard: we will not rest until this spill is contained and we will aggressively pursue compensation for all costs and damages from BP and other responsible parties. There should be no doubt that all responsible parties will be held accountable for paying costs associated with this spill, including all costs of the government in responding to the spill and compensation for loss and damages that arise from the spill.

At the urging of Secretary Salazar and Secretary Napolitano, in a recent letter BP has confirmed that it will pay for all of these costs and damages regardless of whether the statutory liability cap contained in the Oil Pollution Act applies. The bottom line is that, while the investigations as to the cause are still underway, those found responsible will be held fully accountable for their actions.

Outer Continental Shelf Enforcement

Specific to development on the OCS, the Outer Continental Shelf Lands Act (OCSLA) provides the Department with the authority to manage access to and development of energy and mineral resources on the OCS and to ensure that operations on the OCS are safe and protective of the environment. Under its provisions, the Department has the authority to, among other things, promulgate and enforce safety and environmental regulations; investigate and report on major fires, oil spills, death or serious injury; review allegations of any violation of safety regulations under the Act; and summon witnesses and require the production of information.

In order to determine whether an operator's performance on the OCS is in compliance with applicable laws and regulations, the OCSLA provides for scheduled onsite inspections at least once a year of each facility on the OCS and also periodic unannounced onsite inspections where no advance notice is given. If those inspections find noncompliance with applicable requirements, a wide range of enforcement actions can be taken, depending on the circumstances, ranging from written warnings to financial penalties, to drilling and/or production shut-ins of platforms, wells, equipment, or pipelines.

As a matter of policy, Minerals Management Service inspectors and field engineers conduct complete inspections of all safety devices and environmental standards for drilling activities approximately once a month while drilling rigs are on location. MMS also conducts inspections of up to 3,600 OCS production facilities every year. Finally, MMS conducts unannounced inspections generally targeting operators for whom compliance concerns exist or who are conducting inherently dangerous operations, such as welding, construction activities, and normal production activities at the same time.

If an operator is found in violation of a safety or environmental requirement, MMS issues a citation requiring that the violation be fixed within 14 days. On average about 24,000 inspections per year are conducted and 2,500 Incidents of Non-Compliance (INCs) are issued. Many of these INCs are for minor non-compliance issues such as marking equipment improperly, but some are for serious non-compliance issues such as 5 unauthorized bypassing of safety devices. The latter triggers an automatic civil penalty referral, discussed in detail below, and may result in a component or facility shut-in.

Issuance of a facility shut-in order is a serious and expensive penalty for non-compliance as it stops all production until the issue is fixed. In 2009, MMS issued 97 INCs that resulted in shutting-in a production facility and 20 that resulted in shutting-in a drilling facility.

Evidence of serious non-compliance may result in the assessment of civil or criminal penalties for failure to comply with requirements under the law, a license, a permit, or any regulation or order issued under the Act. These provisions are found in section 24 of the Act (43 U.S.C. §1350), and are currently set at not more than $35,000 per day for civil administrative penalties, or $100,000 per day for criminal penalties.

Violations that cause injury, death, environmental damage, or pose a threat to human life or the environment will trigger a Civil Penalty Review. Civil penalties are reviewed and assessed by the MMS under three categories that reflect the severity and number of operator violations. From fiscal year 2000 through FY 2008 over $18 million in civil penalties were collected.

In the spirit of working to improve and reform the MMS inspection program, and as part of our MMS reform agenda, in September 2009 the Secretary asked the National Marine Board, an arm of the highly respected National Academy of Sciences, to direct an independent review of MMS's inspection program for offshore facilities. The results of that review are due to us this fall and will help us enhance the effectiveness of that program as we implement our reforms.

We are also addressing the program through changes to the budget. The MMS inspection program, which currently has 55 inspectors in the Gulf of Mexico Region and 7 in the Pacific and Alaska Regions, would receive under the President's fiscal year 2011 Budget funding for an additional 6 inspectors for offshore oil and gas facilities in the Gulf, an increase of more than 10 percent. In addition, the Administration's recently submitted legislative proposal to address the BP oil spill also contains, among other things, a request for an additional $29 million for the Department to further increase its inspection capability, as well as to support the development of new enforcement and safety regulations, and to carry out studies needed in light of this event.

The Outer Continental Shelf Lands Act Amendments Act

The Outer Continental Shelf Lands Act Amendments Act, S. 3346, proposes to increase the amount of the civil penalties available under the OCSLA to $75,000 per day; provide for a mandatory civil penalty of not more than $150,000 per day, without regard to the allowance of a time period for corrective action, for continuing violations that constitute a threat of serious, irreparable, or immediate harm or damage to life, including fish and aquatic life, property, mineral deposits, or the environment; and increase criminal penalties for violations to $10 million.

The maximum daily civil penalty was adjusted to $35,000 by regulation in March 2007. While the Department published a notice summarizing review of the amount of this maximum civil penalty in the Federal Register in January 2010, we recognize that the underlying statutory requirements have not been amended in 20 years, when the amount for civil penalties was changed as part of the Oil Pollution Control Act of 1990. Moreover, the statutory amount for criminal penalties has not been amended since its enactment in 1978 when the existing criminal penalty provisions of not more than $100,000 per day or imprisonment for not more than 10 years were put in place.

The investigations into the Deepwater Horizon explosion and this spill have not been completed, so it is premature to speculate as to the extent to which the proposed increased penalty provisions would apply to this particular matter. Nevertheless, given the time that has elapsed since these provisions were last amended, we believe it is appropriate to consider thoughtful increases in the amount of both civil and criminal penalties under the Act. We welcome the opportunity to work with Congress on this matter as this legislation moves forward.

Conclusion

The Department is committed to ensuring that we are doing all we can to assist those in the Gulf Coast region to persevere through this disaster and that our important places are protected and restored. We are working to ensure that BP and other responsible parties are doing all they can to stop the discharge of oil and meet their responsibilities—and commitments—to the region. The reforms we are putting in place will ensure the integrity of the OCS program into the future. And the joint investigation we are carrying out with the Department of Homeland Security and the 30 day safety review ordered by the President will provide us with valuable information and will help us identify what caused this tragedy and what safety measures should be immediately implemented.

We will get to the bottom of this disaster and will hold those responsible fully accountable.

The CHAIRMAN. Thank you very much.
Mr. Bennett, go right ahead.

STATEMENT OF CRAIG BENNETT, DIRECTOR, NATIONAL POLLUTION FUND CENTER, UNITED STATES COAST GUARD

Mr. BENNETT. Good morning, Chairman Bingaman, Ranking Member Murkowski, and members of the committee. I am grateful for the opportunity to testify today about the Oil Pollution Act of 1990 Liability and Compensation Regime, as it relates to the oil spill in the Gulf.

I have been the director of the National Pollution Fund Center for 2 years, and I was chief of the financial management division at the NPFC for 4 years, prior to assuming my current position.

My role as the director of the NPFC in this response is threefold. First, I fund the Federal response, using amounts Congress has made available from the Oil Spill Liability Trust Fund, the so-called "emergency fund." Second, I ensure the responsible party is advertising its availability to pay claims for removal costs and damages. If claimants are not fully compensated by a responsible party, they may present their claims to the NPFC for payment from the fund. Third, I recover Federal response costs and claims paid by the fund from any and all responsible parties.

With respect to the Deepwater Horizon response, BP reported, yesterday, that they have spent over $760 million in their response to this spill. Federal response costs against the emergency fund have totaled $72.4 million. Fund costs include the direct cost of the Coast Guard and 27 other Federal partners, as well as over $7 million in funding that has been provided to 14 different State agencies for State response efforts.

While we exercised our one-time advancement authority to move $100 million from the parent fund to the emergency fund, the emerging scale of this enormous response effort is burning through those funds. This is important because, while the responsible party may be reimbursing emergency fund cost, those reimbursements go back into the parent fund, not the emergency fund. We believe that we may exhaust the existing balance in the emergency fund as early as June 5, much earlier than previously forecast.

Legislation is on the Hill to allow for additional advancement authority, and it is critical that we obtain that authority as soon as possible.

As the responsible party, BP is advertising and paying claims for the removal costs and damages that result from this spill. To date, BP has reportedly received over 25,000 claims and paid over $28 million. Most of these claims have been for loss of income and wages to individuals, small businesses, and fishermen. As of yesterday, BP has reportedly opened 28 claims processing centers, with over 432 personnel in the field to assist claimants, and has established a 1–800 number as well as Web-based claims submission capability.

BP currently has the capacity to accept 6,000 claims per day, and advises that it can surge quickly to a capacity of 15,000 claims per day, putting over 2500 adjusters in the field, if necessary. My staff is in daily conversation with BP executives regarding any concerns that are brought to our attention regarding claimants' efforts to submit their claims.

A central tenet of OPA 90 is that the polluter pays. Federal response costs are being accounted for, and will be billed to, BP and other responsible parties and guarantors, under OPA. We anticipate frequent, periodic billings and prompt payment.

Going forward, the administration will continue response we have sustained since the first day of this incident. Individuals, communities, and businesses have suffered as a result of this spill. The OPA regime is working to ensure a robust Federal response, that those damaged from this spill are compensated, and the polluter pays.

The Department supports the administration's legislative proposal, and we look forward to working with Congress to adjust the OPA regime appropriately.

Thank you for the opportunity to testify today. I look forward to your questions.

[The prepared statement of Mr. Bennett follows:]

PREPARED STATEMENT OF CRAIG BENNETT, DIRECTOR, NATIONAL POLLUTION FUND CENTER, UNITED STATES COAST GUARD

Good morning Chairman Bingaman and distinguished members of the committee. I am grateful for the opportunity to testify before this committee on the subject of the BP Deepwater Horizon oil spill currently ongoing in the Gulf of Mexico.

On the evening of April 20, 2010, the Transocean-owned, BP-chartered, Marshall Islandsflagged Mobile Offshore Drilling Unit (MODU) DEEPWATER HORIZON, located approximately 72 miles Southeast of Venice, Louisiana, reported an explosion and fire onboard. This began as a Search and Rescue (SAR) mission-within the first few hours, 115 of the 126 crewmembers were safely recovered; SAR activities continued through April 23rd, though the other 11 crewmembers remain missing.

Concurrent with the SAR effort, the response to extinguishing the fire and mitigating the impacts of the approximate 700,000 gallons of diesel fuel onboard began almost immediately. In accordance with the operator's Minerals Management Service (MMS)-approved Response Plan, oil spill response resources, including Oil Spill Response Vessels (OSRVs), were dispatched to the scene. After two days of fighting the fire, the MODU sank into approximately 5,000 feet of water on April 22nd. On April 23rd, remotely operated vehicles (ROVs) located the MODU on the seafloor, and, on April 24th, BP found the first two leaks in the riser pipe and alerted the federal government. ROVs continue to monitor the flow of oil.

As the event unfolded, a robust Incident Command System (ICS) response organization was stood up in accordance with the National Response Framework (NRF) and the National Oil and Hazardous Substances Pollution Contingency Plan (NCP). ICS is utilized to provide a common method for developing and implementing tactical plans to efficiently and effectively manage the response to oil spills. The ICS organization for this response includes Incident Command Posts and Unified Commands at the local level, and a Unified Area Command at the regional level. It is comprised of representatives from the Coast Guard (Federal On-Scene Coordinator (FOSC)), other federal, state, and local agencies, as well as BP as a Responsible Party.

The federal government has addressed the Gulf Oil Spill with an all-hands-on deck approach from the moment the explosion occurred. During the night of April 20th-the date of the explosion-a command center was set up on the Gulf Coast to address the potential environmental impact of the event and to coordinate with all state and local governments. After the MODU sank on the 22nd, the National Response Team (NRT), led by the Secretary of Homeland Security and comprised of 16 Federal agencies including the Coast Guard, other DHS offices, the Environmental Protection Agency (EPA), National Oceanic and Atmospheric Administration (NOAA), Department of Interior (DOI), as well as Regional Response Teams (RRT), were activated.

On April 29, Secretary Napolitano declared the event a Spill of National Significance (SONS), which enhanced operational and policy coordination at the national level and concurrently allowed Admiral Allen's appointment as the National Incident Commander (NIC) for the Administration's continued, coordinated response. The NIC's role is to coordinate strategic communications, national policy, and resource support, and to facilitate collaboration with key parts of the federal, state and local government.

The NIC staff is comprised of subject matter experts from across the federal government, allowing for immediate interagency collaboration, approval and coordination. While the FOSC maintains authorities for response operations as directed in the National Contingency Plan, the NIC's primary focus is providing national-level support to the operational response. This means providing the Unified Command with everything that they need—from resources to policy decisions—to sustain their efforts to secure the source and mitigate the impact. This will be a sustained effort that will continue until the discharges are permanently stopped and the effects of the spill are mitigated to the greatest extent possible. Beyond securing the source of the spill, the Unified Command is committed to minimizing the economic and social impacts to the affected communities and the nation.

UNIFIED RECOVERY EFFORTS

The Unified Command continues to attack the spill offshore. As of May 13, 2010, over 5 million gallons of oily water have been successfully recovered using mechanical surface cleaning methods. Further, approximately over 704,000 of surface dispersants have been applied to break up the slick, and controlled burns have been used as weather conditions have allowed. In addition to the ongoing offshore oil recovery operations, significant containment and exclusion booms have been deployed and staged strategically throughout the Gulf region. These booms are used to protect sensitive areas including: environmental and cultural resources, and critical infrastructure, as identified in the applicable Area Contingency Plans (ACPs). To date, more than a million feet of boom have been positioned to protect environmentally sensitive areas. Fourteen staging areas have been established across the Gulf Coast states and three regional command centers. The Secretary of Defense approved the requests of the Governors of Alabama (up to 3,000), Florida (up to 2,500), Louisiana (up to 6,000), and Mississippi (up to 6,000) to use their National Guard forces in Title 32, U.S. Code, status to help in the response to the oil spill.

VOLUNTEERISM AND COMMUNICATION WITH LOCAL COMMUNITIES

A critical aspect of response operations is active engagement and communication with the local communities. Several initiatives are underway to ensure regular communications with the local communities.

1. Active participation and engagement in town hall meetings across the region with industry and government involvement.
2. Daily phone calls with affected trade associations.
3. Coordination of public involvement through a volunteer registration hotline (1-866-448-5816), alternative technology, products and services e-mail (horizonsupport@aol.com), and response and safety training scheduled and conducted in numerous locations.
4. More than 7,100 inquiries received online via the response website (www.deepwaterhorizonresponse.com) with more than 6,121 inquiries completed, with 4-hour average time of response.
5. Over 568,000 page hits on response website.
6. Over 110 documents created/posted to response website for public consumption.
7. News, photo/video releases, advisories to more than 5,000 media/governmental/private contacts.
8. Full utilization of social media including Facebook, YouTube, Twitter and Flickr.
9. Establishment of Local Government hotlines in Houma, LA (985-493-7835), Mobile, AL (251-445-8968), Robert, LA (985-902-5253).

MODU REGULATORY COMPLIANCE REQUIREMENTS

43 U.S.C. § 1331, et seq. mandates that MODUs documented under the laws of a foreign nation, such as the DEEPWATER HORIZON, be examined by the Coast Guard. These MODUs are required to obtain a U.S. Coast Guard Certificate of Compliance (COC) prior to operating on the U.S. Outer Continental Shelf (OCS).

In order for the Coast Guard to issue a COC, one of three conditions must be met:

1. The MODU must be constructed to meet the design and equipment standards of 46 CFR part 108.
2. The MODU must be constructed to meet the design and equipment standards of the documenting nation (flag state) if the standards provide a level of

safety generally equivalent to or greater than that provided under 46 CFR part 108.

3. The MODU must be constructed to meet the design and equipment standards for MODUs contained in the International Maritime Organization Code for the Construction and Equipment of MODUs.

The DEEPWATER HORIZON had a valid COC at the time of the incident, which was renewed July 29, 2009 with no deficiencies noted. The COC was issued based on compliance with number three, stated above. COCs are valid for a period of two years.

In addition to Coast Guard safety and design standards, MMS and the Occupational Safety and Health Administration (OSHA) also have safety requirements for MODUs. MMS governs safety and health regulations in regard to drilling and production operations in accordance 30 CFR part 250, and OSHA maintains responsibility for certain hazardous working conditions not covered by either the Coast Guard or MMS, as per 29 U.S.C. § 653 (a) and (b)(1).

COAST GUARD/MMS JOINT INVESTIGATION RESPONSIBILITIES

On April 27th, Secretary Napolitano and Secretary of the Interior Ken Salazar signed the order that outlined the joint Coast Guard-MMS investigation into the Deepwater Horizon incident.

Information gathering began immediately after the explosion-investigators from both agencies launched a preliminary investigation that included evidence collection, interviews, witness statements from surviving crew members, and completion of chemical tests of the crew. The aim of this investigation is to gain an understanding of the causal factors involved in the explosion, fire, sinking and tragic loss of 11 crewmembers.

The joint investigation will include public hearings, which have already begun in Kenner, LA. The formal joint investigation team consists of equal representation of Coast Guard and MMS members. The Coast Guard has also provided subject matter experts and support staff to assist in the investigation.

LESSONS LEARNED FROM PAST RESPONSES

The Coast Guard has been combating oil and hazardous materials spills for many years; in particular, the 1989 major oil spill from the EXXON VALDEZ yielded comprehensive spill preparedness and response responsibilities.

In the 20 years since the EXXON VALDEZ, the Coast Guard has diligently addressed the Nation's mandates and needs for better spill response and coordination. For example, a SONS Exercise is held every three years. In 2002, the SONS Exercise was held in New Orleans to deal with the implications of a wellhead loss in the Gulf of Mexico. In that exercise, the SONS team created a vertically integrated organization to link local response requirements to a RRT. The requirements of the RRT are then passed to the NRT in Washington, D.C, thereby integrating the spill management and decision processes across the federal government. The response protocols used in the current response are a direct result of past lessons learned from real world events and exercises including SONS.

Although the EXXON VALDEZ spill shaped many of the preparedness and response requirements and legislation followed to this day, other significant events since 1989 have generated additional lessons learned that have shaped our response strategies. For example, the M/V COSCO BUSAN discharged over 53,000 gallons of fuel oil into San Francisco Bay after colliding with the San Francisco-Oakland Bay Bridge in heavy fog. Through the recovery of over 40 percent of the spilled product, the Unified Command recognized improvements were needed in some areas. As a result, new guidance and policy was developed to better utilize volunteers in future responses. Additionally, standard operating procedures for emergency notifications were improved to ensure better vertical communications between the federal responders and local governments. Furthermore, steps were taken to preidentify incident command posts (ICPs) and improve booming strategies for environmentally sensitive areas.

Most recently, the Coast Guard led a SONS exercise in March, 2010. Nearly 600 people from over 37 agencies participated in the exercise. This exercise scenario was based on a catastrophic oil spill resulting from a collision between a loaded oil tanker and a car carrier off the coast of Portland, Maine. The exercise involved response preparedness activities in Portland, ME; Boston, MA; Portsmouth, NH; Portsmouth, VA; and Washington, DC. The response to the SONS scenario involved the implementation of oil spill response plans, and response organizational elements including two Unified Commands, a Unified Area Command, and the NIC in accordance with the National Contingency Plan and national Response Framework. The exercise focused on three national-level strategic objectives:

1. Implement response organizations in applicable oil spill response plans
2. Test the organization's ability to address multi-regional coordination issues using planned response organizations
3. Communicate with the public and stakeholders outside the response organization using applicable organizational components.

The SONS 2010 exercise was considered a success, highlighting the maturity of the inter-agency and private oil spill response capabilities and the importance of national-level interactions to ensure optimal information flow and situational awareness. The timely planning and execution of this national-level exercise have paid huge dividends in the response to this potentially catastrophic oil spill in the Gulf of Mexico.

ROLE OF THE OIL SPILL LIABILITY TRUST FUND

The Oil Spill Liability Trust Fund (OSLTF), established in the Treasury, is available to pay the expenses of federal response to oil pollution under the Federal Water Pollution Control Act (FWPCA)(33 U.S.C. § 1321(c)) and to compensate claims for oil removal costs and certain damages caused by oil pollution as authorized by the Oil Pollution Act of 1990 (OPA) (33 U.S.C. § 2701 et seq.). These OSLTF uses will be recovered from responsible parties liable under OPA when there is a discharge of oil to navigable waters, adjoining shorelines or the Exclusive Economic Zone (EEZ). The OSLTF is established under Revenue Code section 9509 (26 USC §9509), which also describes the authorized revenue streams and certain broad limits on its use. The principal revenue stream is an 8 cent per barrel tax on oil produced or entered into the United States (see the tax provision at 26 U.S.C. § 4611). The barrel tax increases to 9 cents for one year beginning on January 1, 2017. The tax expires at the end of 2017. Other revenue streams include oil pollution-related penalties under 33 U.S.C. § 1319 and § 1321, interest earned through Treasury investments, and recoveries from liable responsible parties under OPA. The current OSLTF balance is approximately $1.6 billion. There is no cap on the fund balance but there are limits on its use per oil pollution incident. The maximum amount that may be paid from the OSLTF for any one incident is $1 billion. Of that amount, no more than $500 million may be paid for natural resource damages. 26 U.S.C. § 9509(c)(2).

OPA further provides that the OSLTF is available to the President for certain purposes (33 U.S.C. § 2712(a)). These include:

> Payment of federal removal costs consistent with the NCP. This use is subject to further appropriation, except the President may make available up to $50 million annually to carry out 33 U.S.C. § 1321(c) (federal response authority) and to initiate the assessment of natural resource damages. This so-called "emergency fund" amount is available until expended. If funding in the emergency fund is deemed insufficient to fund federal response efforts, an additional $100 million may be advanced, one time, from the OSLTF subject to notification of Congress no later than 30 days after the advance. See 33 U.S.C. § 2752(b). Additional amounts from the OSLTF for Federal removal are subject to further appropriation.
>
> Payment of claims for uncompensated removal costs and damages. Payments are not subject to further appropriation from the OSLTF. 33 U.S.C. § 2752(b).
>
> Payment of federal administrative, operating and personnel costs to implement and enforce the broad range of oil pollution prevention, response and compensation provisions addressed by the OPA. This use is subject to further appropriation to various responsible federal agencies.

National Pollution Funds Center (NPFC) Funding and Cost Recovery

The NPFC is a Coast Guard unit that manages use of the emergency fund for federal removal and trustee costs to initiate natural resource damage assessment. The NPFC also pays qualifying claims against the OSLTF that are not compensated by the responsible party. Damages include real and personal property damages, natural resource damages, loss of subsistence use of natural resources, lost profits and earnings of businesses and individuals, lost government revenues, and net costs of increased or additional public services that may be recovered by a State or political subdivision of a state.

In a typical scenario, the FOSC, Coast Guard or EPA accesses the emergency fund to carry out 33 U.S.C. § 1321(c), i.e., to remove an oil discharge or prevent or mitigate a substantial threat of discharge of oil to navigable waters, the adjoining shoreline or the EEZ. Costs are documented and provided to NPFC for reconciliation and eventual cost recovery against liable responsible parties. Federal trustees may request funds to initiate an assessment of natural resource damages and the NPFC will provide those funds from the emergency fund as well.

OPA provides that all claims for removal costs or damages shall be presented first to the responsible party. Any person or government may be a claimant. If the responsible party denies liability for the claim, or the claim is not settled within 90 days after it is presented, a claimant may elect to commence an action in court against the responsible party or to present the claim to the NPFC for payment from the OSLTF. OPA provides an express exception to this order of presentment in respect to State removal cost claims. Such claims are not required to be presented first to the responsible party and may be presented direct to the NPFC for payment from the OSLTF. These and other general claims provisions are delineated in 33 U.S.C. § 2713 and the implementing regulations for claims against the OSLTF in 33 CFR Part 136. NPFC maintains information to assist claimants on its website at www.uscg.mil/npfc.

NPFC pursues cost recovery for all OSLTF expenses for removal costs and damages against liable responsible parties pursuant to federal claims collection law including the Debt Collection Act, implementing regulations at 31 CFR parts 901-904 and DHS regulations in 6 CFR part 11.

Aggressive collection efforts are consistent with the "polluter pays" public policy underlying the OPA. Nevertheless, the OSLTF is intended to pay even when a responsible party does not pay.

OSLTF and the Deepwater Horizon

On May 12th, the Administration proposed a legislative package that will: enable the Deepwater Horizon Oil Spill response to continue expeditiously; speed assistance to people affected by this spill; and strengthen and update the oil spill liability system to better address catastrophic events. The bill would permit the Coast Guard to obtain one or more advances—up to $100 million each—from the Principal Fund within the Oil Spill Liability Trust Fund to underwrite federal response activities taken in connection with the discharge of oil that began in 2010 in connection with the explosion on, and sinking of, the mobile offshore drilling unit Deepwater Horizon. To deal more generally with the harms created by oil spills as well as to toughen and update these laws, the bill would, for any single incident, raise the statutory expenditure limitation for the Oil Spill Liability Trust Fund from $1 billion to $1.5 billion and the cap on natural resource damage assessments and claims from $500 million to $750 million.

In order to help those impacted by the oil spill get claims and benefits quickly, the legislative package proposes Workforce Investment Act provisions which would assist states in providing one-stop services for those affected by the oil spill, including filing claims with BP, filing unemployment insurance/Oil Spill Unemployment assistance claims, accessing job placement, training and workforce services, accessing SNAP, child care, or other social service benefits, and applying for SBA Disaster Loans.

The emergency fund has been accessed by the FOSC for $68 million as of May 23, 2010. BP, a responsible party, is conducting and paying for most response activities. The Coast Guard requested and received an advance of $100 million from the OSLTF Principal Fund to the emergency fund as authorized by 33 U.S.C. § 2752(b), because the balance remaining in the emergency fund was not adequate to fund anticipated federal removal costs. BP and Transocean have been notified of their responsibility to advertise to the public the process by which claims may be presented. As of May 24th, 23,960 claims have been opened with BP, and nearly $28 million has been disbursed; though Transocean has also already been designated as a responsible party, all claims are being processed centrally through BP.

CONCLUSION

Through the National Incident Command, we are ensuring all capabilities and resources-government, private, and commercial-are being leveraged to protect the environment and facilitate a rapid, robust cleanup effort. Every effort is being made to secure the source of the oil, remove the oil offshore, protect the coastline, include and inform the local communities in support of response operations, and mitigate any impacts of the discharge.

Thank you for the opportunity to testify today. I look forward to your questions.

The CHAIRMAN. Thank you all very much.

I'll start with a few questions.

Mr. Perrelli, as I understood your testimony, your position, the administration's position, is that we should eliminate the cap on liability that is currently in the law, and not have any cap. Is that correct?

Mr. PERRELLI. I think it's important to realize that OPA covers a wide range of activities—small vessels, large vessels. But, with respect to activities that might have the risk of resulting in a similar major oil spill, such as we are seeing currently, we don't think there should be an arbitrary cap on corporate responsibility.

The CHAIRMAN. Let me ask—Mr. Hayes, do you agree with that position, or is that something that Interior is still assessing?

Mr. HAYES. We are totally in line with the Department of Justice on this, Mr. Chairman.

The CHAIRMAN. All right.

Mr. HAYES. The administration.

The CHAIRMAN. Mr. Hayes, let me change subjects just slightly here. There continue to be reports in the media about permits being issued for drilling in the Gulf, and waivers being issued with regard to environmental requirements. We have tried to nail this down. I believe the—Secretary Salazar indicated that the position that he had taken, and that the administration had taken, is that there would be no additional drilling permitted in the Gulf until some of these studies and investigations have been done.

Could you clarify, in short terms, where we stand on that, what operations are still being permitted, which operations have been suspended or stopped?

Mr. HAYES. Sure. I'd be happy to, and I appreciate the chance to clarify this, Mr. Chairman.

First, let me say that, as you'll recall from last week, there is a requirement that the Minerals Management Service act on exploration plans within 30 days under the Outer Continental Shelf Lands Act. That's the area where the categorical exclusions have been used. Because of that statutory requirement, exploration plans continue to be approved, but those do not allow for drilling. The drilling decision is a later decision, under an APD. There has to be a special affirmative act to allow for drilling.

As for the drilling, the Department put a stop on processing new APD permits after——

The CHAIRMAN. Now——

Mr. HAYES [continuing]. April 20.

The CHAIRMAN [continuing]. Specify "APD," for those of us who are not experts.

Mr. HAYES. Application for Permit to Drill.

The CHAIRMAN. All right.

Mr. HAYES. There are basically 2 types of drilling permits, if you will. There is the initial APD that gives you the authority to put a new hole in the ground. Then, there can be situations where, after you have started drilling, there are safety issues that arise or other circumstances that arise that require you, as a driller, to move that ongoing drilling operation around. Those are called "sidetracks," "revised permits to drill," "bypass permits." Those are all for ongoing, already-started drilling activities.

What the Department has stopped is approving new APDs. For current drilling activities, where there's a need, for—often for safety reasons—to do a bypass or to do what's called a sidetrack, those have been approved, but those are not new APDs. That's the—I think, has risen—is the reason for the lack of clarity.

But, there—in the deep water, there have not been any new APDs implemented since April 20. There were 2 that were approved between April 20 and May 6; they were both suspended. No APDs that have been filed since April 20 have been allowed to go forward and do new deepwater drilling.

The CHAIRMAN. Thank you for clarifying that.

Let me ask the—sort of, the other side of the coin with—when we're talking about possible liability limits. The other side of the coin seems to me to be requirements for financial responsibility. What are we going to require, there, for companies that go into the deep water and drill?

I'd ask, Mr. Hayes, if you have a position on that.

Mr. HAYES. We agree with Senator Whitehouse, that it's appropriate to—and your point in your opening statement, Mr. Chairman—that it's appropriate to revisit that financial assurance requirement.

That seems anachronistic, frankly, $150 million financial assurance, certainly for a situation like this for a company like BP. Fortunately, it does not appear to be coming into play here. But, we do think it's appropriate. Just as we look at potentially revising upwards the statutory penalties, we look at revising upwards the financial assurance requirements.

The CHAIRMAN. Senator Murkowski.

Senator MURKOWSKI. Thank you very much, Mr. Chairman.

Mr. Perrelli, Mr. Hayes, I just wanted to make sure that I understood, clearly, your statements to the Chairman. Is it correct to state, then, that both of you would agree that we should not have the current $75-million liability cap, that it should be an unlimited cap?

Mr. PERRELLI. I think—for the future, for activities such as deepwater drilling, where there is a risk of a similar major oil spill, I think we think that there should not be——

Senator MURKOWSKI. So, are——

Mr. PERRELLI [continuing]. That cap.

Senator MURKOWSKI [continuing]. Are you differentiating between deepwater and shallow-water exploration and——

Mr. PERRELLI. I think we'll need to work with the Congress and the committee on the whole range of activities that are subject to OPA—small vessels, large vessels, shallow-water drilling, deeperwater drilling. But, certainly in the context of any activity that could result in a similar major oil spill, our——

Senator MURKOWSKI. But——

Mr. PERRELLI [continuing]. Our view is, there should not be an arbitrary cap.

Senator MURKOWSKI. But, there should be some assessment of risk and some analysis, then, that plays in there.

Mr. PERRELLI. Certainly. We should look at the risks and look at transition rules, as well.

Senator MURKOWSKI. Mr. Hayes, I want to make sure that I'm not misinterpreting your statement.

Mr. HAYES. I'm on all fours with Mr. Perrelli, Senator. It's always good to pay attention to your lawyer.

Senator MURKOWSKI. Let me ask you—both of you have stated this morning, and certainly your boss, Mr. Hayes—Secretary Salazar—has made very, very clear that BP, as the responsible party, will be paying, and that BP doesn't expect to be held to the cap. So, if, in fact, it is correct, here, that there's no doubt that the responsible party is going to be held fully accountable for this particular spill, does the administration think, then, that we need any specific legislation to make this true, to ensure that this is, in fact, the case?

Mr. PERRELLI. I think we are going continue to work to ensure that BP lives up to its commitments. So, they have made that commitment; we take it seriously, and we will work with them to ensure that they do so. I think our focus on the legislative proposal is transition into a new liability regime.

Senator MURKOWSKI. So, basically, going forward.

Mr. PERRELLI. Yes. We're focused on going forward.

Senator MURKOWSKI. Let me ask about that, because as the $75-million strict liability cap is in place now, it only applies in cases where there's been no gross negligence, willful misconduct, or regulatory noncompliance. So, I'm assuming that there is a possibility, or a likelihood, that any of these 3 faults can be alleged, in which case the liability capped is removed altogether.

Mr. PERRELLI. That's correct, Senator.

Senator MURKOWSKI. OK. So, in fact, what we're talking about here, with a cap, may or may not—and the "may not" is, perhaps, quite likely—may not be in place for this particular—for the Deepwater Horizon incident.

Mr. PERRELLI. I certainly don't want to speculate as to where the facts may lead, but, under OPA, if there's gross negligence or violation of any safety, operational, or construction regulation that may have caused this spill, the caps would be removed.

Senator MURKOWSKI. I won't ask you to speculate, but I will ask you if the Department of Justice is aware, at this point in time, of any incident, instance, either proven or alleged, of the responsible parties engaging in gross negligence, willful misconduct, or regulatory noncompliance.

Mr. PERRELLI. Senator, I don't want to comment on any pending or contemplated investigation. There are many facts yet to be developed. So, I can't give you any insight on that, currently.

Senator MURKOWSKI. Let me ask you, Mr. Bennett, because when we were in Louisiana yesterday, had an opportunity to hear from representatives from the fishing industry, the small charter boat industry, as well as the oyster fishermen, and there was a discussion about what is happening with the processing of claims, and there was concern that, in fact, claims were being expedited, that there was a process that was transparent and that worked for those that had been affected, whether within their businesses, in being able to go out and fish, or charter bookings that had been canceled. The question to you is, In your office's role of overseeing this claims process, are we sure that we've got the—a sufficient number of claims offices, that we have staffing that is sufficient, that we have a staff that can deal with—for instance, we've got a big Vietnamese community within the shrimping industry, do we have translators there? Are we fully set up?

The Secretary of the Interior was pretty adamant yesterday that there would be followup meetings with Admiral Landry. He volunteered, himself, to go down there as a part of a followup meeting because—what we heard was that, in fact, the process that is being set up is not meeting the needs of the local people. Can you comment on that?

Mr. BENNETT. Yes, Senator, I'll be glad to. By OPA, our—the law requires us to require the responsible party to advertise and collect claims. BP's been very responsive, beyond the law, in our questions or our direction, to—as we oversee and make sure that they're complying with taking claims. They've—we welcome any complaints or any concerns about the claimant process. We are not getting a lot of concerns sent to my office, so if you're hearing that, I do want to know about it. My executives talk to BP's daily about their claim processes. As I said, they've opened 28 offices. They've been opening capacity at a rate of about 28 percent, and the claims growth has grown at a rate of about 12 percent, and it's leveling off. Now, it'll probably pick up once oil comes ashore and we start getting more damage claims. But, it—but, the capacity to take 6,000 claims a day—they're currently getting about 2,000 claims a day, they can surge to a capacity of 15,000 claims a day. So, again, this is industries—what they're telling us; but, it appears, from what we know, the data that we have, that they're meeting the requirement. As soon as we got word about Vietnamese and Spanish and Croatian communities, we approached BP and said, "We expect you to handle that." They immediately got translator services, and they immediately started advertising, the next day, in local community newspapers and media. So, BP has been responsive to any of our requests or direction from any concerns that we become aware of.

Senator MURKOWSKI. You're probably going to be hearing about this meeting.

Thank you, Mr. Chairman.

Senator Dorgan [presiding]. Let me ask—the comment that was just made, that BP has indicated that it intends to pay all legitimate claims—obviously, the question ism "What's legitimate?" But, aside from that, is BP's representation legally binding in any way? Legally binding on them? They've simply indicated that they would intend to pay legitimate claims. So, 6 months or, a year from now, is that a legally binding commitment?

Mr. PERRELLI. I don't want to make a judgment as to how that commitment might be viewed in a court of law down the road. They've certainly made that commitment very publically, as well as publically committed not simply to pay claims beyond the 75 million, but not to seek recourse against the fund, which is also a significant commitment. So, we intend—whether it's in a court of law or elsewhere—we certainly intend to have them uphold that commitment.

Senator DORGAN. So, you intend to represent that commitment as something that's binding.

Mr. PERRELLI. As I said, I can't speak to whether or not it would be binding in a court of law if we were to litigate this down the road.

Senator DORGAN. That's the reason I asked the question is, obviously that's pretty important. In the middle of this crisis, while the gusher is still flowing on the ocean floor, the representation today might be very different than the actions 6 months or a year from now. So, I appreciate the fact that BP has made these representations. I'd feel more comfortable if there were some binding requirements here, or they were legally binding.

Let me ask about another topic. It is about a letter that you've received at the Justice Department from about 18 of us recently and it asks you to take a look at an announcement by TransOcean Limited, the owner of the Deepwater Horizon oil rig. TransOcean is headquartered in Switzerland, by the way, where it has a dozen employees, and it has 1300 employees in Houston. But they moved to Switzerland, most likely, to reduce its tax obligation to the United States. So, in Switzerland, it announces that it's—intends to distribute $1 billion to its shareholders at this point in time. Is that troublesome to you? We've written a letter asking whether it's troublesome, because there may be substantial liability here for TransOcean because of this spill, as well. If they go ahead and distribute that $1 billion, in the face of potential liability, wouldn't that be a pretty difficult circumstance for a lot of people, whose lives have been dramatically affected, to see?

Mr. PERRELLI. Senator, I don't think I've actually seen a copy of the letter, although I've been told that it was sent. I think our focus is—from all of the responsible parties, or anybody who's potentially liable, to recover every dime for the taxpayer. So, regardless of whether TransOcean or another responsible party has spent funds, our goal is going to be to get back every dime for the American taxpayer.

Senator DORGAN. Yes, well, you will just have received this, then. Would you take a hard look at this letter. It does raise real questions. At a previous hearing, we had, at this table, 3 parties, each of which were pointing in the other direction, saying "Well, it wasn't our fault, it was somebody else's fault," one of which was TransOcean. I notice, in their location in Switzerland, they want to give a billion dollars back to their shareholders, at a time when I think there might be very substantial liability questions that would suggest we'd want them to have that money available.

You talk, also, about the issue of liability for offshore oil and gas development, and I think you talked about that, Mr. Hayes, you talked about significant increases in liability, as well, Mr. Perrelli. The significant increases obviously will affect different companies in different ways. I think you alluded, just a moment ago, it may well have decision points with respect to whether it's a shallow or a deep well, the size of the project, size of the company, and so on. Describe for us, if you will, what your thinking is, going forward, with respect to liability. "Significant increases," does that suggest that you believe there ought to be a cap on liability requirements for companies? If so, what would the conditions be that attach to a cap?

Mr. PERRELLI. The legislative proposal that the administration sent up was structured, requiring entities of all sizes to pay all removal costs plus some amount of damages yet to be determined. We want to very much work with the committee and look at the different factors, look at, for different types of oil exploration or transport, the factors needed to ensure that companies invest sufficiently in safety, the factors needed to ensure that the funds, at the end of the day, are sufficient to make sure that all claims are all paid out. I think we also want to look at the market impacts that may affect different kinds of entities that may be involved in, you know, transport of small amounts of oil on a coastline, versus drilling in very deep water. We think those are different activities, each one requires a little bit different look.

Senator DORGAN. Let me go back to this other point. Are there ways that you could take steps to make legally binding the statement by BP, or at least ask them to make this legally binding at this point, No. 1?

No. 2, that's the one side of potential liability. The other side is a billion dollars being disbursed to shareholders at a time when you may want to see that it is available for liability on TransOcean.

Are you interested in working on both of those to see that the folks who are affected by this oil spill are protected?

Mr. PERRELLI. I will. I'll take that back and we'll give that further consideration, Senator.

Senator DORGAN. All right.

Senator Sessions.

Senator SESSIONS. Thank you.

Mr. Perrelli, to walk through this—the statue that provides liability coverage, it has some good things in it. I believe that it can be improved, and I've offered legislation to do that. With regard to the damages of cleanup, the cost of all the cleanup, is there any question that the responsible party—this case, BP—is responsible for all the cleanup costs, the marshes, the beaches, and that kind of thing?

Mr. PERRELLI. Senator, there's no question that they're responsible for all the removal costs.

Senator SESSIONS. With regard to the $75-million category, is this a loss of profits that shrimpers or fishermen may have, potential beaches—rentals that get canceled, and those kind of things? Is that what is capped under this bill?

Mr. PERRELLI. What the $75-million cap applies to, if it applies, as we talked before—there are many situations in which it would not—it applies to a wide range of damages; and that includes the kinds of economic damages that you were discussing, the cost of public services that may be required in response to a disaster such as this, as well as damage to natural resources, the impact, once the oil is removed, of trying to revive that habitat. That's an area where, in prior oil spills, there have been very significant—in the hundreds of millions of dollars of impact on natural resources.

Senator SESSIONS. But, on classical State law, that has not be abrogated. This is the kind of lawsuits one might file under Federal Law in Federal court, I presume that we're talking about, the 700 million in the total cleanup costs. But, there are possibilities that under classical State, pollution, or nuisance, or trespass-type actions, you could file those lawsuits, also.

Mr. PERRELLI. OPA expressly allows States to impose greater liability or requirements. That's correct, Senator.

Senator SESSIONS. Legislation—I've worked with Senator Vitter, and we—the legislation that I signed onto does have retroactive liability alterations in the Act. I know Senator Dorgan just said, “Should we do this?” I have heard some complaints, or concerns really, that this raises constitutional questions about the ability of Congress to retroactively alter this situation. Does the Department of Justice have an opinion about that?

Mr. PERRELLI. I’ll start, first, by noting that there would be many situations in which—for example, if the cap didn’t apply—there wouldn’t be a concern about retroactivity. But, Congress legislates retroactively all the time. I think—while we think that there would be arguments that might be made under the Takings Clause and other provisions, we think we would have pretty strong arguments in response, that Congress, in legitimately legislating in order to ensure cleanup and compensation, would not run afoul of constitutional protections.

Senator SESSIONS. Do you—what would expect that to be contested?

Mr. PERRELLI. One could envision it could be contested either as a constitutional matter or in a breach of contract action, which might actually be more likely.

Senator SESSIONS. Mr. Perrelli, with regard to the investigations that are ongoing—I know MMS and, I believe, Coast Guard maybe has people on that team—to what extent is the FBI involved in that?

Mr. PERRELLI. Senator, I cannot comment on any contemplated or pending investigation.

Senator SESSIONS. I would just suggest, if there is a possibility of a criminal investigation, and everyone is presumed innocent, but if there is, the FBI should be involved in that. My observation is that their expertise in those kind of matters exceed agency investigators, although they have great skills in many ways.

With regard to the shallow-water drilling, Mr. Bennett, is that within your jurisdiction? We do have thousands of jobs that I understand will soon end if all shallow-water drilling is stopped, because it doesn’t take long to get one of those wells completed and the ones already ongoing are soon wrapping up. What is your expectation with how long it will take to make a decision about that?

Mr. HAYES. Senator, I’ll take that one for—on behalf of the Secretary of the Interior.

The policy statement that I described to, and clarified with, the Chairman is in place only until the 30-day report is delivered to the President later this week. So, this was essential a timeout on the drilling of new deepwater wells, in particular. After May 6, though, we are also—stopped approving shallow-water—drilling APDs, as well. But, that’s just until the end of the week. So, the issue has been raised, appropriately, as to what should happen after this safety report gets delivered to the President. We’re looking at that issue and are cognizant of the fact that there are important distinctions between shallow-water and deepwater risks.

Senator SESSIONS. Thank you.

The Chairman [presiding]. Senator Wyden.

Senator WYDEN. Thank you, Mr. Chairman.

Mr. Perrelli, at our hearing 2 weeks ago, I laid out a pattern of horrific safety problems at BP. Today, I want to talk about the recent pattern of actions taken by the TransOcean company since the accident in the Gulf. Let me walk you very specifically through the timetable.

At our hearing 2 weeks ago, the top management of TransOcean said that they had nothing to do with the accident. They said it was BP's fault; they, in effect, were just following BP's orders.

Two days after our hearing, in the committee, after they absolved themselves of responsibility, TransOcean went off to Federal court in Houston. There, they filed a claim, under American Admiralty Law that governs maritime accidents, and they said again they aren't liable, but if they are, their liability ought to be capped at $26.7 million.

On the day after that, on May 14, TransOcean announced, at the shareholders meeting in Switzerland, that they are going to distribute $1 billion in profits to shareholders.

Given that pattern of activity—and I had followed it since our hearing—I went out and put together this letter, with 17 of our colleagues as cosigners, asking you all to investigate. By the way, we told the administration—not only did we send it to you all, we told you that I was going ask about ask about it this morning. So, the Department's been on notice.

Here's my question—is, Would you agree that TransOcean shifting a billion dollars in funds from the company to its shareholders and its Federal court filing under the Admiralty Laws could possibly be a way for TransOcean to either evade or limit its liability?

Mr. PERRELLI. Let me respond by focusing particularly on the Limitation of Liability Action, in which, although we are not a party to that action, we have already responded to TransOcean, and I imagine that we will also make a filing in that case, explaining in the strongest possible terms that what TransOcean is attempting to do there is inappropriate. The 1851——

Senator WYDEN. But, you believe what TransOcean is doing is inappropriate.

Mr. PERRELLI. The filing of the Limitation of Liability Action——

Senator WYDEN. All right.

Mr. PERRELLI [continuing]. Seeking to limit their liability to $26 million, the statute that they are seeking to use is a statute perhaps best known as being the statute used by the owners of the Titanic to attempt to limit their liability. Congress, when it enacted OPA, expressly said that the Limitation of Liability Act does not limit liabilities under OPA, and further said it expressly doesn't limit the liabilities that States may impose for oil pollution activities.

Senator WYDEN. What does the Department intend to do in response to the recent pattern of activity by TransOcean? Seems to me that what's going on here is pretty clear. For a company that said it did nothing wrong, this company is working pretty hard to insulate itself from being held responsible for an accident involving its own drill rig and crew. It seems to me this is an area where the Department really needs to dig in and do a thorough investigation. Are you all prepared to do that?

Mr. PERRELLI. As I indicated, I can't comment on any pending or contemplated investigation. But, I will say that, on this question of whether they can limit their liability through this action that they have filed, we believe, in the strongest possible terms, and we'll make that clear, that they cannot.

Senator WYDEN. I certainly hope that you will look into this thoroughly, because, given what they said before the committee, given the fact that, just in a matter of days, they went out and took this action, then went forward and delivered, in effect, you know, the dividend—I mean, it seems to me this is a pattern of activity that requires that the Department look into this thoroughly, because the decision to transfer this enormous amount of money out of its own count—account, as a profit, given all the events that had taken place in recent weeks, suggests to me that, if the Government doesn't look into this, the Government is simply not following through in an area that I think is central for the Government to have credibility, in terms of its response to the tragedy in the Gulf.

So, I appreciate you're saying that their conduct is inappropriate. I hope you'll look into this, you know, thoroughly, because this pattern of activity—and I consider it a pattern, literally from the weeks since they came here—strikes me as unacceptable. I can't say that it is illegal, at this point, but it certainly ought to be unacceptable, given the tragedy that we've seen in the Gulf.

Thank you, Mr. Chairman.

The CHAIRMAN. Senator Barrasso.

Senator BARRASSO. Thank you very much, Mr. Chairman. Mr. Chairman, thank you for holding this hearing.

You know, I think the headline from yesterday's Wall Street Journal tells it all. It says, "U.S. Was Not Ready For Major Oil Spill: Despite mature offshore operations, Gulf crews are improvising with chemicals, protective boom, and outdated maps"—outdated maps.

Today is day 36. Oil continues gushing into the Gulf. No one is really sure how much oil is leaking. We were first told it was 1,000 barrels a day. Then it looked like 5,000 barrels a day. But, now scientists say that the number may be much higher. The cloud of confusion over how much oil is spilling into the Gulf is very concerning, and it's also very unclear who is in charge. I mean, here is today's Washington Post, front page, "Administration Torn on Getting Tough with BP." Administration torn on getting tough with BP.

Secretary Salazar says BP has missed deadline after deadline. Secretary Salazar says that if BP is not doing what they're supposed to be doing, we'll push them out of the way.

But, just yesterday, the Coast Guard Commandant, Thad Allen, said, "To push BP out of the way, it would raise the question 'To replace them with what?'" That's why it is hard to tell who is in charge.

The response seems to be delayed. We've tried many different things, from the "top hat" to the "junk shot" to the "undersea straw." During testimony just last week to this committee, Secretary Salazar promised that, last Saturday or Sunday, triggers would be pulled to try the "dynamic kill." Saturday passed. Sunday passed. No sign of a dynamic kill. So, 36 days, still no solution.

The American people want to know if the administration is dithering while U.S. coastal communities are engulfed in oil. Public anger, truly, is growing. The American people are angry; angry at

BP and angry at the administration. The administration's confused response stands in contrast to public anger. The administration likes to say that it will, quote, "keep the boot on the throat of BP." It's time to use the other boot to actually stop the spill.

BP clearly bears the brunt of the responsibility for this spill. BP is responsible for paying for all of the cleanup, regardless of cost. But, the White House and the administration has some responsibility. There are lapses in regulatory enforcement.

The second story in The Washington Post today, "U.S. Oil Drilling Agency Ignored Risk Warnings: Officials Bypass Laws Protecting Environment, Documents Show."

So, the spill occurred in Federal waters, the Federal Government owns the underground oil, so my question, Mr. Hayes, At what point does the administration take complete control to protect our communities and our coastline?

Mr. HAYES. Mr. Senator, Commandant Thad Allen is the national incident commander, operating on behalf of the administration and the government, under the laws that this Congress passed, the Oil Pollution Act of 1990, to supervise all cleanup activities. He is the national incident commander. He is in charge. BP is paying for and implementing, under his charge, the cleanup responsibilities.

Senator BARRASSO. Can you, then, talk to us about the upcoming plan, if there is one, for this dynamic kill?

Mr. HAYES. I can. Secretary Chu is in Houston, as we speak. Today, the final preparations are being implemented for a dynamic kill attempt that—if today's procedures go well and the pressure testing proves sound, a decision will be made, late tonight or early tomorrow morning, to attempt the dynamic kill tomorrow.

Senator BARRASSO. Thank you.

Thank you, Mr. Chairman.

The CHAIRMAN. Senator Sanders.

Senator SANDERS. Thank you, Mr. Chairman.

I think we all understand that we are looking at one of the most significant ecological disasters in the modern history of our country. We understand that nobody can fully estimate what either the economic or ecological damages will be.

All of this takes place, I must say, at a time when the American people are having significant doubts about BP and TransOcean. We are looking at a multinational corporation—BP—which earned $5.6 billion in the first quarter of this year. We're looking at a company which many Americans are now believing ignored many safety factors as they proceeded rapidly in order to move that project along. We're looking at a company which denied, refused to put information out there. We still do not know, today, how much oil is leaking. We were told 1,000 barrels a day, there are estimates, now, that it may be 100 times that. We still don't know. We see a company which many Americans think is—been not been aggressive in attempting to stop the flow—or effective, for sure—or in proceeding forward—going forward with the cleanup.

Now, I want to get back to Mr. Perrelli and ask you a very, very simple question. I think you've dodged it a little bit. Should we eliminate the cap completely and hold BP 100 percent responsible so that they pick up all of the economic damages as well as the environmental damages? Very simple question. Yes or no.

Mr. PERRELLI. Senator, BP has said they're committed to doing that——

Senator SANDERS. Oh, oh, let me—I'm sorry.

Mr. PERRELLI [continuing]. I think, as I indicated, our proposal to lift the cap is focused on the future. As I indicated to Senator Sessions, however, we also think that we would have strong arguments if Congress ultimately decided to——

Senator SANDERS. No. But, what is your—that's not a good answer, to be honest with you, in the sense that what BP said doesn't mean much. You may be the last person in America who trusts or believe what BP says. It doesn't matter. A year from now, the TV cameras will not be there. Some fisherman is going to have to go to court to try to get damages from BP, a multibillion-dollar corporation. This guy doesn't stand a chance. Now is the moment. Do we lift the cap, or do we not? What's the answer?

Mr. PERRELLI. As I indicated, our proposal to lift the cap is focused on the future.

Senator SANDERS. So, it is not dealing with BP. It is, as I hear it—correct me if I'm wrong—your position is that we should not lift the cap on BP for this oil spill.

Mr. PERRELLI. As I indicated, we are focused on the proposals for the future. That's our——

Senator SANDERS. Mr. Chairman, I would hope that this committee and the Senate will move aggressively to move in a very different direction that the administration is indicating.

The taxpayers—it is beyond comprehension that you have a oil company making over 5 billion in profits in the first quarter of this year at the same time as you have a Nation running a record-breaking deficit, that the taxpayers of this country should be asked to pay one nickel—one nickel in costs, just because BP says something—I'm glad you believe them, but you may be one of the few people in America who trusts them.

Mr. PERRELLI. Senator, I don't think it's a question of belief, here. We are committed to recovering every single dime from BP. As we talked about before, there are many circumstances in which the cap will not apply. We also recognize that there are many other statutes that may be available to pursue either penalties or damages from BP, as well as State law. So, we think that we will be able to recover, regardless of BP's commitment, every single dime that has been expended by the taxpayers.

Senator SANDERS. I think you are ignoring, and making it more—you're ignoring the best way to go forward, by simply lifting the cap.

That's it.

Thank you very much, Mr. Chairman.

The CHAIRMAN. Senator Bennett.

Senator BENNETT. Thank you, Mr. Chairman.

Thank you, to the witnesses.

Lets look ahead. Mr. Perrelli, I appreciate your comment about that. I'll leave it at—leave it to the experts to try to get this spill stopped and get everything under control. But, there are 2 views that I see with respect to the future; one that says, "OK, this happened because people were lax." That's the headline that Senator Barrasso quoted. Either the company was lax, or the regulators were lax, or both were lax, and that—therefore, if we tighten up all of the procedures, nothing of this sort will ever happen again. The other view is, "Hey, accidents happen. We've drilled thousands and thousands of these wells without any incident, and, statistically, this is a very small percentage and—of difficulty." Accidents happen with automobiles. Accidents happen with airplanes. Accidents are going to happen anytime you have a large number of activities of this kind.

I'd like reaction to that. Is this, indeed, just a very small percentage that "accidents happen," and so, we can go statistically, as far into the future as we have in the past, and—before we get another one of these? Or is this, indeed, a circumstance where there lax practices, either on behalf of the company or the regulator—I don't want to have to determine who was lax—but, was there something, here, that could be prevented in the future?

Then the second side of that, if we do move in a direction that, by virtue of the cap, drives the nonmajors out of this business so that only the majors survive, because only the majors will be big enough to deal with a cap, what are the chances that they will be able to get sufficient insurance, if the cap is set so high or if the cap is lifted altogether, so that a business decision will be made by the board, or boards, of these companies, "The risk is too great, and we will drop all activities as far as drilling is concerned"? Look into the future, in these 2 areas, and give me your responses.

Mr. Hayes, you're probably the one who's thought about these issues the most. So, I'll let you come first. But, anybody else who has a view about these 2 areas, I'd like to get your response.

Mr. HAYES. Thank you, Senator. I would say that, with regard to the first point, this is an unusual accident. That's clearly the case. There were 2 independent, serious things that went wrong: the blowout, on the one hand; and the failure of the blowout preventer, on the other. Each of those, independently, is extraordinarily rare. To have them both happen at the same time is even more extraordinarily rare.

However, it's unacceptable for it to occur. That is why we are committed to doing a thorough investigation and a top-to-bottom evaluation of whether we have the right regulatory system, the—whether we are state-of-the-art, whether there is enough oversight of industry. You will see, later this week, in the report that the Secretary will be delivering to the President, some ideas, in terms of additional interim safety measures that we might consider—that the President might consider imposing. Because this type of accident, rare though it is, is unacceptable, and must not be allowed to ever happen again.

That is our commitment, to work with you and the Congress to make sure we have a system in place so that we never have to deal with this again.

I'll defer to Mr. Perrelli on the second part of your question, Senator, on the cap issue.

Mr. PERRELLI. Senator, I think we learn, unfortunately, every day, more information about the risks of offshore drilling. I think that rethinking the liability provisions is appropriate as we learn more and more about the risks.

You raise a number of questions about insurance. I would say that today, the major players in this industry already are involved in a mix of insurance and self-insurance. They are—today—facing the prospect potentially of unlimited liability, both because there are many circumstances in which the caps wouldn't apply, but also because of State law and other law that is out there.

So, I think that our fundamental starting point is that the polluter should pay. Where you have a risky activity that is highly lucrative in a place where the entity that is most able to ensure safety is going to be the company engaged in the activity—we think that it's appropriate, where there's the prospect of a similar major oil spill, to not have a cap on liability.

Senator BENNETT. But, you're going to drive toward concentration in the industry, perhaps.

Mr. PERRELLI. As I think we've talked about, we think there are a lot of activities covered under OPA and different liability regimes, as under the current law, may be appropriate. I think our focus here is on where there's a prospect of a similar major oil spill. I think most of that activity—and Mr. Hayes can talk—most of the deepwater activity is a much smaller set of players.

Senator BENNETT. Thank you, Mr. Chairman.

The CHAIRMAN. Thank you.

Let me just advise folks—the order that folks have arrived in, here, is Stabenow next, then Shaheen, then Menendez, and Landrieu, then Cantwell. Of course, if some of our Republican colleagues arrive, they'll be inserted in that.

Senator STABENOW. Then we do have a second panel. So, let me just advise everybody that we would like to do all of that before lunch.

Senator STABENOW. Thank you, Mr. Chairman, and I appreciate this hearing as an important part of the series of hearings we've been having.

I do feel compelled, before asking a question, to make an editorial comment, because one of the things that I can see happening, in terms of where we focus accountability, is the fact that we're not looking at, more broadly, the consequences of a philosophy of deregulation that has gone on now for many, many years. We see that on Wall Street, we see that now with Minerals Management Services. We see that across the board. There's an inspector general report out, documenting the fact that there were—unscrupulous use of government funding from 2005 to 2007, too close to industries that they regulate.

I raise this only because this White House is dealing with holdovers from the former administration that believed in that deregulation, backing up, not having the accountability, letting the industries basically make the decisions. Even, the—the Minerals Management Services chief who just stepped down was from the Bush administration. I mention that only because I can hear where this is going, in terms of pressing—that somehow this is all about the Obama administration.

Mr. Chairman, we have 107 nominees pending right now that—the President doesn't even have his own team in place. So, I'm happy to hold them accountable. But, let's give them their team first. They don't even have their team in place. I think that directly relates to what is going on here. So, I would say—I don't want to deal with the old team that was in place, right now, the holdovers from a philosophy, frankly, that has caused us a lot of trouble. It causes a lot of problems, that philosophy of deregulation and not protecting the public interest. Let's put the new team in place and let the President have his team, and—I mean, I'm willing to be as tough as ever—as anyone on them.

Let me talk about BP and ask your comments, because when we look at the efforts—at the history of BP, it is very disturbing, beyond this horrendous situation that we have right now.

In March 2005, an explosion at a BP facility in Texas resulted in 15 deaths, 170 injuries. After an investigation, it was determined that BP cut maintenance and safety controls in an effort to reduce costs.

The oil spill right now doesn't appear to be an isolated accident—or incident. It's part of a track record of cutting corners on safety, that is, frankly, very concerning, that has cost workers their lives.

Last October, OSHA again fined BP because they failed to correct safety hazards they found after that 2005 explosion, as well as 439 new safety hazards found since then. They were fined $20 million for a huge oil spill in Alaska in 2006 because of a corroded pipeline. According to a recent study, BP refineries are responsible for 97 percent of all flagrant violations found by government inspectors in the refinery industry. Most of these citations from inspectors found that they were—their behavior was egregious and willful.

So, my question is, Given the track record, at this point, is there any reason, or evidence to date, that BP may have been grossly negligent or in violation of an applicable Federal safety construction or operating regulation, for any of the actions right now, that would put them in a position to waive the current $75-million cap?

Mr. PERRELLI. Senator, you correctly state that those are circumstances in which the cap would not apply. Our focus to date has really been on cleanup, and I don't want to comment on any contemplated or pending investigation on this matter, from the Justice Department.

Senator STABENOW. Does anyone else want to comment? I mean, clearly this is a record of serious concerns about cutting costs. Raises a lot of questions about how we got into this situation without safety provisions put in place, in case something like this happened, even though we've been told this could never happen, and that's why that we don't have the answer. This has gone on for over a month, because somehow it never was going to happen. But, it does raise serious questions about a number of different things. I hope we're going to focus on this in a much more direct way in the future.

Yes.

Mr. HAYES. I'd be happy to just reinforce the notion, Senator, that we intend to absolutely look at the entire BP record, as part of the overall investigation that is now underway. I fully expect the commission, that the President announced last Saturday, will also look at whether there's a pattern here for this company, and do a stem-to-stern evaluation of the adequacy of the regulatory program. In that regard, I appreciate your comment, that the inspector general report that came out today reinforced the notion that, prior to the time this administration took office, there were serious problems at the Minerals Management Service.

Secretary Salazar, in the very first month of coming into the office, established a new ethics procedure for MMS. The focus at that time was on the revenue side. We stop—we ended the royalty-in-kind program. We required special ethics training. The Secretary today has asked the inspector general, as a follow-up to that report, to see if any ethical violations have continued in connection with the New Orleans activities of the Minerals Management Service. The report the inspector general has does not indicate that they have continued. But, we want to make sure they have not continued. This is definitely a work in progress as we deal with what has been too cozy a relationship, as the President has said, between industry and regulators.

Senator STABENOW. Thank you, Mr. Chairman.

The CHAIRMAN. Thank you.

Senator Shaheen.

Senator SHAHEEN. Thank you, Mr. Chairman, for holding for this hearing.

Thank you, gentlemen, for being here.

There's been a lot of talk this morning about the Oil Pollution Act of 1990 and about what the responsible party is required to pay under that Act. I think there's been general agreement, from everybody who's spoken, that BP would be liable to pay the costs of cleanup in the spill. One of the big questions has been about the $75-million liability cap.

I made some charts this morning because I thought it might be instructive to look at how that liability cap of $75 million compares to some of the costs involved in this spill.

So, if we look at this first poster, you can see, at the bottom, if you have a magnifying glass, the $75 million in liability. Above that is the estimated damage to Louisiana's fishing industry, which is, right now, estimated at $2.4 billion. Above that, you can see the estimated damage to Florida's tourism industry, which is estimated at $3 billion. Above that is the dot that shows BP's profits for the first quarter of this year, $6.2 billion. Finally, the large dot at the top are BP's profits for 2009, which are $16–$18.8 billion.

I also thought it would be helpful to show how that $75 million fits into the total profits from BP for 2009, and I misspoke; the profits were $16.6 billion. But, you can see, that $75 million is a very tiny sliver of what BP's profits were. I think that's why you're hearing, we're all hearing, so much concern this morning about that $75-million liability cap.

So, the question that I really have—and I'm proud to be on Senator Menendez's legislation to raise that liability cap to $10 billion—but, the question that's been raised this morning is, Should we have a cap at all on liability? Does a cap encourage riskier behavior on the part of the industry? I don't know, Mr. Perrelli, if you would like to take first shot at that.

Mr. PERRELLI. I think in a situation where you have the risk of a similar major oil spill, you have activity that is risky itself, but highly lucrative. You have the companies that are engaged in it in the best position to invest in new technology to ensure it's safer, to ensure that they have sufficient staff, ensure that they are complying with all of the Federal regulations. That is the situation where not having any cap, I think, we think, makes a lot of sense, and is consistent with the basic principle that polluters should pay for all of the damage that they cause.

Senator SHAHEEN. Thank you.

There's been a lot of talk about BP, and BP has said they will pay the total cost of the cleanup. I think most of us, looking at the scenes on television, would say that that cost of cleanup includes the cost of the booms, the cost of, you know, people raking in the oil. But, what else is included in that cost of cleanup? Are all of the legal costs that the Department—the Attorney General is incurring right now included in that cost of cleanup? Is the time that the Department of the Interior is spending on this included in that cost of cleanup?

Mr. PERRELLI. I'll speak first and then maybe Mr. Bennett can add to it. But, certainly the costs that are covered include public services, expenditures by public services, all of the damages to our natural resources, all of the efforts of agencies to minimize or mitigate the impact of the oil, the impact on subsistence uses of fish, and the economic impact. So, it is a broad range of categories.

I will say that this is certainly unprecedented in its scope, and there may be issues that arise that haven't been dealt with before. But, certainly OPA was intended to cover a broad range of costs and damages.

Mr. HAYES. I'll just add, as Mr. Perrelli said, damages include unreimbursed removal costs, personal or property damages, lost profits or earnings, loss of government revenues, cost of increased public services, natural resource damages. That's the damage side.

On the response side, the Federal on-scene coordinator, Admiral Landry, is the authority for driving the response, under the leadership of the national incident commander, Admiral Allen.

So, clearly, under OPA, those response costs are determined by her, so she needs something—for instance, the National Guard rollout, we're paying for out of the fund to support her and covering that cost.

The surge of government that you're seeing, that we're all part of, is new ground, as Mr. Perrelli said. We really haven't ever done this before, on that scale. We're still working through some of the public policy questions of if it's clearly needed by the FOSC and the NIC, a lot of—you know, getting teams of scientists together to evaluate dispersants or to evaluate flow rates—that's clearly something they need and want—it's paid for. If I were to go down and do a tour of the site, I would pay out of Coast Guard operating costs, because I don't consider myself part of the response.

Senator SHAHEEN. Thank you.

The CHAIRMAN. Senator Menendez.

Senator MENENDEZ. Thank you, Mr. Chairman.

Let me commend the administration for embracing an unlimited liability for economic damages flowing from an offshore rig spill, at least for deepwater development. I have been advocating we need to lift the cap, and I'm going to amend my legislation to pursue unlimited liability, certainly in this regard.

But, I think we disagree about the question of retroactivity. I want to ask Mr. Perrelli—under the law, not what BP has said—just so I get this straight—under the law, BP has, beyond all of the natural resources cleanup and the cleanup and all of those efforts, which I understand they will pay for—but, after that, when there is liability, under the law right now, they only have a $75-million liability cap, is that correct? Yes or no?

Mr. PERRELLI. I wouldn't characterize it that way, Senator. There is a cap, but it is conditioned on a number of things, including that there has to be no gross negligence and no violation of any safety, operational, or construction regulations. So, there are many circumstances in which the cap would not apply at all. But, in addition, there are certainly other Federal statutes at issue, as well as State law, that could be brought into play.

Senator MENENDEZ. Then why would we have put aside a $75-million liability cap if all of these other elements could expose you, unlimitedly?

Mr. PERRELLI. OPA, when it was enacted, among other things, for example, increased penalties under the Clean Water Act, as well as expressly left State law remedies of——

Senator MENENDEZ. In the absence of those exemptions that you describe, they would have a $75-million liability cap.

Mr. PERRELLI. If—under OPA, if those exceptions didn't occur, there would be a $75-million liability cap, as I indicated——

Senator MENENDEZ. Now——

Mr. PERRELLI [continuing]. State law would still be available.

Senator MENENDEZ [continuing]. Has BP entered into a consent agreement with the Department of Justice to agree to—as they have verbalized, and as the administration has said that they have verbalized—has BP entered into consent agreement to be liable for above the $75-million cap?

Mr. PERRELLI. Not as——

Senator MENENDEZ. Have they—give you any written assurances that, in fact, they will be liable for above the $75–million cap?

Mr. PERRELLI. I believe they've provided written assurances to the Cabinet Secretaries, Secretary Napolitano and Secretary Salazar and—as you know—at least the Chairman, I know, made such statements to some congressional committees.

Senator MENENDEZ. I'd like to see if the Department has a copy, or, if not, Mr. Hayes, I'd like to see what was written, what's the nature of the language of BP's commitment.

Senator MENENDEZ. Because Exxon said all of these—many of these same things during the Exxon Valdez. Then they litigated all the way to the Supreme Court for—it took 20 years, and individuals fell off along the way, who were damaged, simply because they could not sustain it.

Let me ask you, Mr. Perrelli—Senator Murkowski suggested—Is unlimited liability available under State law for this bill? Section 1018 of OPA seems to allow State liability, beyond Federal caps, for oil discharges, but it says, quote, "within such State." Would a spill like this, in Federal waters, be considered a discharge within a State, allowing increased State liability?

Mr. PERRELLI. I think certainly a significant amount of damage to State coastlines, and within a certain distance of the coastline, would be damage to that State. I think that out on the Outer Continental Shelf, the rules may be different. But, certainly there will be significant damages that a State might be able to pursue to its coastline——

Senator MENENDEZ. But, there is no question that this is a discharge, not within a State, but in the territorial waters of the United States and Federal waters, is that correct?

Mr. PERRELLI. That's where the initial discharge occurs, but there's no question, I think, as we see every day, that there's tremendous damage being done to the coastline——

Senator MENENDEZ. I have no disagreement with that, but my point is that, when we go to State liability, it is a litigious process, assuming that BP wants to be litigious along the way. Ultimately, there are no guarantees.

So, if we, in fact, believe that, either between the exceptions that you stated may exist—we don't know whether they're pertinent to this particular incident—or BP's statements that they are going to accept unlimited liability, I don't see what the reticence is to lift—to the unlimited liability, certainly in deepwater drilling.

Let me ask you one other question. The inspector general of the Department of the Interior is soon releasing a report that describes regulators allowing—at MMS—to allowing company officials to fill out inspection forms in pencil—company officials—which inspectors would, quote, "write on top of the pencil in ink and turn in complete forms." This is just the latest in a series of allegations leveled at MMS. Some of these have been referred to U.S. attorneys, and they have passed on it. Is the Justice Department going to look at these incidents and determine whether there is prosecutions that should be leveled?

Mr. PERRELLI. Senator, I can't speak about this particular instance, but if we get a referral from the Inspector General of the Department Interior, we will take a serious look.

Senator MENENDEZ. Mr. Hayes, do you intend to make a referral of the inspector general's report to the Department of Justice?

Mr. HAYES. We have just received this draft report from the IG last night, and I expect the Secretary will do exactly what he did when he came into office, in January 2009, on the heels of the IG investigations in Lakewood, Colorado. He specifically referred everything to the U.S. Attorney, even though that particular investigation had already been processed by the previous administration. In this case, the Secretary issued a press release, this morning, making it clear that he intends to aggressively evaluate these activities, all of which occurred under the prior administration. But, he intends to aggressively look into the individuals involved and to consider prosecution, termination, whatever is appropriate.

Senator MENENDEZ. I respect what the Secretary has done in the ethics reforms that he has instituted. I do hope that there is appropriate referrals to the Justice Department, because only when we act seriously will the regulators understand that you can't, ultimately, be cozying up to the industry and doing what they want and putting us all at risk.

Thank you, Mr. Chairman.

The CHAIRMAN. Senator Landrieu.

Senator LANDRIEU. Yes, I want to go back to this liability question, because Senator Menendez and others have recommended a cap, I think, for the whole offshore, but he clarified, just a moment ago, for deepwater, so I'm not sure, but a cap of 10 billion.

Mr. Perrelli, you testified—and Mr. Hayes—that the administration's position is unlimited cap for deepwater. Is that correct?

Mr. PERRELLI. Senator, for deepwater, where there's a threat of a similar major oil——

Senator LANDRIEU. So, you're deepwater, unlimited; he may be deepwater, 10 billion. If that was in effect today, can you—can this law, this new law that we will consider—whether it's unlimited, as you have recommended—and the administration—or 10 billion, as Senator Menendez—does that go into effect for BP? Can we be retroactive in our laws?

Mr. PERRELLI. We think that there would be strong arguments to say that Congress could, indeed, impose it retroactively.

Senator LANDRIEU. OK, so you believe that there's constitutional grounds to be retroactive.

Mr. PERRELLI. We think it would not violate the Constitution. We recognize that there would be litigation risk, breach of contract actions could be brought, but we think we would have strong arguments. Among other things, OPA, itself, has an express provision saying that Congress may increase liability or requirements on oil companies.

Senator LANDRIEU. So, whether the Congress moves to a$10-billion cap, as suggested by Senator Menendez and others, or the unlimited cap, as suggested by the administration, do you think, in the administration's view, that you should have a different cap for deep water, shallow water, and then near shore? Because, as you know, this drilling can occur in 10 feet of water, 1,000 feet of water, which is considered shallow, and then deep, which is 1,000 to 5,000 and then ultra deep, over 5,000. The risk, of course, are expediential, in terms of—that those—that factor of depth, distance, darkness, as Thad Allen has said so accurately.

So, how is the administration thinking about this? Because it's very important, to thousands of people in the industry that don't drill in deepwater, but have been drilling fairly safely in shallow wells, what—have you—are you thinking about the effect of your proposal on the industry as a whole?

Mr. PERRELLI. I think we recognize, as you indicated, that OPA covers a wide range of different activities that may have different risks. We recognize that it's complicated and there are many factors that have to be considered, including what will create the best incentives for safety, what will ensure that claims will be paid, but the impact on the market, as well.

So, I think we would like to work with the Congress on what are the appropriate liability provisions for different types of drilling or different types of transport. I think—overall, however, I think that a primary point is, "the polluter pays" should be at the core of this. These liability provisions haven't been changed in 20 years, and I think we have learned that they are not sufficient for the risks we face today.

Senator LANDRIEU. I agree with you on that, that they're not sufficient. But, I would call your attention to The Wall Street Journal article today, that insurance premiums for offshore drilling have soared between 15 and 50 percent. Now, for companies like BP, who are generally self-insured with reinsurance, and Shell and Chevron that are big enough to handle these increases and, I think, big enough to pay the billions of dollars of claims that potentially can come, I'm not too concerned. But, I am concerned about actions that this Congress would take that would make it virtually impossible, or very difficult, for other independents and small operators. There are thousands that seem to be invisible to some members, but they're not invisible to me. So, I think we've got to be very careful about that.

I couldn't agree with you more, the polluter should pay. BP should be—pay everything, as I've said; and if anyone else was at fault, they should, as well.

But, Mr. Bennett—I've got a minute left—I want to ask you this question. I need to be very clear with you, as we met in my office for some time; and I appreciate you coming—What does the law require you to do, now, to make BP pay these claims in full and on time? Do you have the authority to make them do that? If not, do you need some additional authority?

Mr. BENNETT. The current law requires me to notify them that their obligation to advertise and to receive claims, and to make sure they're doing that. They're doing that.

Beyond that, what the law allows—that if BP does—either denies a claim or does not respond to a claimant within 90 days, the claimant may bring their claim directly to me, and then I can adjudicate it, and, if I chose to pay it, I will pay BP. The idea behind that is that small claimants, especially, don't have to go through costly litigation. If they don't get the right answer from BP, they can bring it to us, as a second look. If we pay it, it's NPFC and Justice talking to BP about——

Senator LANDRIEU. That's good's to know, that not everybody in Louisiana is going to have hire an attorney. Some of them are, and they're going to want to, and should. But, we don't want everybody having to hire attorneys and accountants and spend thousands of dollars to get a legitimate claim paid.

For the record, Mr. President—Mr. President—Mr. Chairman, I want to say—because TransOcean isn't here, and I just learned this in a meeting with them, but in fairness, I'd like to say this on the record—70 to 80 percent of their revenues come from outside of the United States. So, when someone asked why they may be headquartered outside of the United States, it's because 70 percent of their revenues come from outside of the United States. I'll get the accurate information.

Now, I'm not going to comment at all about their distribution, et cetera, but what people have to understand about this offshore oil and gas industry, which I'm glad everybody's now paying a lot of attention, is that a lot of these companies get a majority of their revenues from other places in the world, not just in the Gulf of Mexico.

Thank you.

The CHAIRMAN. Senator Cantwell.

Senator CANTWELL. Thank you, Mr. Chairman. I know we're going to—I think we're—are you going to have a second panel at some point in time?

The CHAIRMAN. We do have a second panel, right after your questions are finished.

Senator CANTWELL. OK. I almost wish Mr. Meltz could join us now, from the CRS. I'll wait.

But—because Mr. Perrelli—his testimony seems to be a little different than yours on this issue of retroactivity. The reason why I'm interested in this, I think, as like millions of Americans, we want to know who is going to clean this up and how we're going to pay for it, and to make sure that they taxpayer doesn't become the deep pocket on this, and that we also don't wait 20 years, as we did with the Exxon Valdez case. But, in his testimony on retroactivity, he basically says the Constitution disfavors retroactivity. At least 5 constitutional provisions, noted above, basically make it very hard to go back and do retroactivity. So, you seem much more confident.

Mr. PERRELLI. I read Mr. Meltz's testimony, and I actually think it is more consistent. While he starts from the proposition, and I quote, that "the Constitution disfavors retroactivity," as I indicated, Congress legislates retroactively all the time. Particularly in a context where there's an important public policy purpose at issue, Congress is legislating in a rational way to try to address the potential compensation and cleanup for victims in a statute that is not penal in any way, and covers a broad range of—you know, whether it's past and future activities. I think, we think, we have strong arguments that, if Congress decided to legislate retroactively, that it would be upheld as—constitutional.

Senator CANTWELL. In the Oil Spill Liability Trust Fund, or someplace else?

Mr. PERRELLI. I'm not sure I—if——

Senator CANTWELL. How would you legislate—the discussions have been changing the Oil Spill Liability Trust Fund and raising—taking off the cap, thinking about——

Mr. PERRELLI. Right, removal of the cap.

Senator CANTWELL [continuing]. Things of that nature to make it retroactive. Again, I'm all for them paying. What I don't want is to hear, today, "Oh there's this simple answer." I don't want to hear—just like when they were here a few weeks ago, and they were saying, "We're going to pay all legitimate claims." Then I read a list, and they start going, "Oh well, I don't know about that one," or "Yes," or "No." So, I don't want to hear, today, "Oh, we have great hope and promise in retroactivity," only to find out it takes us 25 years to get anywhere on that case. In the meantime, there's significant damage that's not dealt with.

So, he basically says that, on these 5 different issues here, that 3 of them—basically, he say, have—appear to have modest chance of success, and 2 of them seem to have almost no chance of success. Those are those constitutional issues.

So, you're thinking of something different?

Mr. PERRELLI. Senator, I think that our view is that we would have a strong chance to defeat any constitutional claims, if Congress were to lift the caps. So, I may ballpark the chances a little bit differently. But, I think, fundamentally, as I indicated, Congress legislates retroactively quite frequently. As so, we don't think that that would be an issue.

As Mr. Meltz noted, and as I noted before, I do think there certainly is the potential for a breach of contract action. But, OPA itself expressly says, and puts everyone on notice, that Congress has reserved the right to increase penalties, or increase removal costs or damages and increase the liability or impose additional requirements. So, I think that's clear to everyone in the industry.

Senator CANTWELL. But, it doesn't say "retroactively."

Mr. PERRELLI. It doesn't say "retroactively," but, as I indicated, we believe that we have strong arguments to defeat any retroactivity argument that would be made.

Senator CANTWELL. Thank you for your clarity. Do you think that we should also look at—you know, since BP has had something like $373 millions in fines and restitution for environmental violations—a Texas refinery in an explosion in 2005, a leak from a crude oil pipe in Alaska, fraud for conspiring to corner the market and manipulation of propane—do you think that there should be some sort "three strikes, you're out" kind of clause, as it relates to companies doing business, that maybe you wouldn't allow them to continue to bid on new leases?

Mr. HAYES. Senator, we're—we'd be open to that, certainly. I mean, there are other examples, in other environmental laws, of situations where companies are—because of a pattern of behavior, are, for example, not allowed to be—to have Federal contracts, that sort of thing. So, we are—we're absolutely open to that.

I think we're very interested in seeing these investigations run to ground and not prematurely drawing conclusions. But, we do intend to look at those issues.

Senator CANTWELL. Thank you, Mr. Chairman.

The CHAIRMAN. Senator Shaheen, did you wish make another comment?

Senator SHAHEEN. No, I just would like to request that, when Mr. Hayes provides the BP responsibility document to Senator Menendez, that you make it available to the entire committee.

Thank you.

The CHAIRMAN. Let me thank this panel very much for your testimony. You've been very generous with your time. We appreciate it.

Let me call the second panel forward. That's Mr. Jonathan Ramseur, who is specialist in environmental policy with Congressional Research Service; Mr. Rawle King, who is an analyst in financial economics and risk assessment with Congressional Research Service; and Mr. Robert Meltz, who's legislative attorney with the Congressional Research Service.

I would just advise the witnesses that our Republican colleagues are—have been invited to a lunch with the President, beginning here at noon; that's why they are not in attendance. So, that explains some of the absences.

Let me ask each of you to take about 5 minutes and make the main points that you think we need to understand. Then, of course, we will include your full statements in the record.

Mr. Ramseur, go right ahead.

STATEMENT OF JONATHAN RAMSEUR, SPECIALIST IN ENVIRONMENTAL POLICY, CONGRESSIONAL RESEARCH SERVICE

Mr. RAMSEUR. Good afternoon, Mr. Chairman, ranking member, and members of the committee.

My name is Jonathan Ramseur, and I am a specialist in environmental policy in the Congressional Research Service. I have been asked by the committee to discuss aspects of the oil spill liability policy and allocation of costs associated with a major oil spill. My testimony will provide background on the Oil Pollution Act's liability structure and its interaction with the Oil Spill Liability Trust Fund.

I should note that CRS does not advocate policy or take a position on specific legislation.

OPA liability provisions apply to any discharge of oil from a vessel or facility to navigable waters, adjoining shorelines, or the exclusive economic zone of the United States. Responsible parties include owners and operators of vessels or facilities, or lessees of offshore facilities. Responsible parties are liable for oil spill removal costs, natural resource damages, and a range of economic costs.

However, a party's liability may be limited. Liability limits differ by oil spill source. For example, tank vessel liability is generally based on a vessel's gross tonnage. Offshore facilities, like the Gulf well leased to British Petroleum, have their liability caps at all removal costs plus $75 million.

Under some circumstances, a party's OPA liability may be unlimited. Liability limits do not apply if an oil spill was proximately caused by gross negligence or willful misconduct or the violation of an applicable Federal safety construction or operating regulation. In addition, the responsible party must report the spill and cooperate with response officials. It is currently undetermined whether liability limits would apply to the Gulf oil spill. Regardless, individual liability is only one component of the framework established by OPA.

The second significant element is the Oil Spill Liability Trust Fund. Primary purposes of the fund include immediate access to funds for prompt Federal oil spill response, and payment for claims in excess of a responsible party's liability cap. The fund is supported by a per-barrel tax on domestic and imported oil. At present, the tax is 8 cents. A recent estimate, made before the Gulf spill—from OMB—indicated a fund balance of approximately $1.6 billion. However, the fund has a per-incident expenditure cap of $1 billion. When OPA was drafted, Congress intended that this cap would be able to cover catastrophic spills. The National Pollution Fund Center, which manages the fund, would only be able to award claims up to this threshold. It is my understanding that such a scenario has not occurred in the fund's history.

Costs beyond the OPA trust fund's per-incident limit could be addressed in several ways. Existing Federal authorities could be used to provide assistance in some circumstances. Another route of recourse would be the parties to State loss. OPA specifically does not preempt States from imposing additional liability or requirements relating to oil spills; however, it is uncertain how State laws would interact in this situation, and compensation via State laws may involve considerable litigation.

These issues raise a central policy question: How should Congress allocate the costs associated with a major accidental oil spill? Congress may consider modifying OPA's liability and compensation framework. Potential options for Congress include, but are limited to, increasing the liability limits so the responsible party would be required to pay a greater portion of the spill cost, to increasing the per-barrel oil tax to more quickly raise the fund's balance. Concurrently, Congress could remove or raise the per-incident cap on the trust fund. It might be noted that the $1-billion cap established in 1990 is approximately equivalent to $600 million, in today's dollars.

Three, authorizing repayable advances, to be made via the appropriations process, to the trust fund so that the fund would have resources to carry out its functions.

Recent legislative proposals have included these approaches.

Thank you again for the invitation to appear today. I will be pleased to address any questions you may have.

[The prepared statement of Mr. Ramseur follows:]

STATEMENT OF JONATHAN RAMSEUR, SPECIALIST IN ENVIRONMENTAL POLICY, CONGRESSIONAL RESEARCH SERVICE

Good afternoon Mr. Chairman, Ranking Member, and Members of the Committee. My name is Jonathan Ramseur. I am a Specialist in Environmental Policy in the Congressional Research Service (CRS). On behalf of CRS, I would like to thank the Committee for inviting me to testify here today. I have been asked by the Committee to discuss aspects of oil spill liability policy and allocation of costs associated with a major oil spill. My testimony will provide background on the Oil Pollution Act's liability structure and its interaction with the Oil Spill Liability Trust Fund. I should note that CRS does not advocate policy or take a position on specific legislation.

Oil Spill Liability before the 1989 Exxon Valdez Spill

When the Exxon Valdez ran aground in March 1989, multiple federal statutes, state statutes, and international conventions dealt with oil discharges. Many observers[1] described this legal collection as an ineffective patchwork. Arguably, each law had perceived shortcomings, and none provided comprehensive oil spill coverage. For more than 15 years prior to the Valdez, Congress had made attempts to enact a unified oil pollution law. Several contentious issues hindered the passage of legislation. A central point of debate dealt with state preemption: whether a federal oil spill law should limit a state's ability to impose stricter requirements, particularly unlimited liability.

In the aftermath of Valdez—which was followed by a handful of other large oil spills in 1989 and 1990-Members faced great pressure to overcome these disputed issues.[2] The spill highlighted the inadequacies of the existing coverage and generated public outrage. The end result was the Oil Pollution Act of 1990 (OPA)[3]—signed August 18, 1990—the first comprehensive law to specifically address oil pollution to waterways and coastlines of the United States.

Oil Spill Liability under the Oil Pollution Act of 1990

OPA liability provisions apply to any discharge of oil (or threat of discharge) from a vessel (e.g., oil tanker) or facility (e.g., offshore oil rig)[4] to navigable waters, adjoining shorelines, or the exclusive economic zone of the United States (i.e., 200 nautical miles beyond the shore). Responsible parties, including owners/operators of ves-

[1] See, for example, U.S. Congress, House Committee on Merchant Marine and Fisheries, Report accompanying H.R. 1465, Oil Pollution Prevention, Removal, Liability, and Compensation Act of 1989, 1989, H.Rept. 101-242, Part 2, 101st Cong., 1st sess., p. 32.

[2] For further discussion, see CRS Report RL33705, Oil Spills in U.S. Coastal Waters: Background, Governance, and Issues for Congress, by Jonathan L. Ramseur (and cited references contained therein).

[3] P.L. 101-380, primarily codified at 33 U.S.C. 2701, et seq.

[4] The definition of "facility" is broadly worded and includes pipelines and motor vehicles. 33 U.S.C. 2701(9).

sels/facilities and/or lessees of offshore facilities[5]—are liable[6] for (1) oil spill removal costs and (2) a range of other costs including:

- injuries to natural resources (e.g., fish, animals, plants, and their habitats);
- loss of real personal property (and resultant economic losses);
- loss of subsistence use of natural resources;
- lost government revenues resulting from destruction of property or natural resource injury;
- lost profits and earnings resulting from property loss or natural resource injury; and
- costs of providing extra public services during or after spill response.[7]

Compared to the pre-OPA liability framework, OPA significantly increased the range of covered damages.[8] Moreover, a responsible party is now liable (subject to the limits discussed below) for all cleanup costs incurred, not only by a government entity, but also by a private party.[9] Limits (or Caps) to Liability Barring exceptions identified below, responsible party liability is limited or capped for each "incident."[10] The liability limits differ based on the source of the oil spill: some limits are simple dollar amounts; others have unlimited liability for cleanup costs with limits on other damages. For example (and relevant to the Gulf spill):

- Mobile offshore drilling units (MODUs), like the Deepwater Horizon unit (owned by Transocean), are first treated as a tank vessel for their liability caps. Based on this unit's gross tonnage, its liability cap would be approximately $65 million (per the National Pollution Funds Center).[11] If removal and damage costs exceed this liability cap, a MODU is deemed to be an offshore facility for the excess amount.[12]
- Offshore facilities, like the Gulf well leased to British Petroleum, have their liability capped at "all removal costs plus $75 million."

The National Pollution Funds Center (NPFC) described the liability for this incident as follows:

> Liability for the New Horizon Incident: The lessee of the area in which the offshore facility is located is clearly a responsible party for the reported discharge below the surface from the well, an offshore facility. The OPA liability limit, if it applies, is all removal costs plus $75 million. The owner of the MODU would also be a tank vessel responsible party for any oil discharge on or above the surface of the water. The MODU liability limit, if it applies, as a tank vessel, is approximately $65 million. If the OPA oil removal costs and damages resulting from the discharge on or above the water exceed this liability amount the MODU is treated as an offshore facility for the excess amount. In that case the lessee of the area in which the offshore facility is located would be a liableresponsible party up to the offshore liability limit amount of all removal costs plus $75 million. (emphasis added by CRS)[13]

Loss of Liability Limit

Liability limits do not apply if the incident was "proximately caused" by "gross negligence or willful misconduct" or "the violation of an applicable Federal safety, construction, or operating regulation . . . " If one of these circumstances is deter-

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[5] See 33 U.S.C. 2701(32).

[6] Responsible parties have several defenses from liability (33 U.S.C. 2703): act of God, act of war, and act or omission of certain third parties. These defenses are analogous to those of the Superfund statute (the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA, commonly known as Superfund), P.L. 96-510) enacted in 1980 for releases of hazardous substances. See 42 U.S.C. 9607(b).

[7] OPA Section 1002(b)(2).

[8] Congress recognized that "there is no comprehensive legislation in place that promptly and adequately compensates those who suffer other types of economic loss as a result of an oil pollution incident." U.S. Congress, House Committee on Merchant Marine and Fisheries, Report accompanying H.R. 1465, Oil Pollution Prevention, Removal, Liability, and Compensation Act of 1989, 1989, H.Rept. 101-242, Part 2, 101st Cong., 1st sess., p. 31.

[9] OPA Section 1002(b)(1).

[10] "Incident" means any occurrence or series of occurrences having the same origin, involving one or more vessels, facilities, or any combination thereof, resulting in the discharge or substantial threat of discharge of oil. 33 U.S.C. 2701(14).

[11] See National Pollution Funds Center, "Oil Pollution Act Liabilities for Oil Removal Costs and Damages as They May Apply to the Deepwater Horizon Incident" (undated).

[12] USC 2704(b).

[13] See National Pollution Funds Center, "Oil Pollution Act Liabilities for Oil Removal Costs and Damages as They May Apply to the Deepwater Horizon Incident" (undated).

mined to have occurred, the liability would be unlimited. In addition, the responsible party must report the incident and cooperate with response officials to take advantage of the liability caps. According to the National Pollution Funds Center, liability limits are "not usually well defined until long after response," and litigation may be required to resolve the issue.[14]

Increasing Liability Caps

OPA requires the President to issue regulations to adjust the liability limits at least every three years to take into account changes in the consumer price index (CPI).[15] Despite this requirement, adjustments to liability limits were not made until Congress amended OPA in July 2006. The Coast Guard and Maritime Transportation Act of 2006 (P.L. 109-241) increased limits to doubleand single-hulled vessels.[16] Subsequently, the Coast Guard made its first CPI adjustment to the liability limits in 2009.[17] The offshore facility limit has remained at the same level since 1990. According to the Federal Register preamble (July 1, 2009), the Coast Guard will join efforts with the other relevant agencies-Environmental Protection Agency, Department of the Interior, and Department of Transportation-to submit CPI adjustments together in 2012.

Oil Spill Liability Trust Fund

Before the passage of OPA, federal funding for oil spill response was widely considered inadequate,[18] and damage recovery was difficult for private parties.[19] To help address these issues, Congress established the Oil Spill Liability Trust Fund (OSLTF). Although Congress created the OSLTF in 1986,[20] Congress did not authorize its use or provide its funding until after the Exxon Valdez incident.

Pursuant to Executive Order (EO) 12777, the U.S. Coast Guard created the National Pollution Funds Center (NPFC) to manage the trust fund in 1991. The fund may be used for several purposes, including:

- prompt payment of costs for responding to and removing oil spills;
- payment of the costs incurred by the federal and state trustees of natural resources for assessing the injuries to natural resources caused by an oil spill, and developing and implementing the plans to restore or replace the injured natural resources; and
- payment for the range of claims described above (e.g., financial losses; government revenue losses; property damages; etc).

Projected Level of the Fund

OPA provided the statutory authorization necessary to put the fund in motion. Through OPA, Congress transferred other federal liability funds[21] into the OSLTF. In complementary legislation, Congress imposed a 5-cent-per-barrel tax on the oil industry to support the fund.[22] Collection of this fee[23] ceased on December 31, 1994, due to a sunset provision in the law. However, in April 2006, the tax was reinstated by the Energy Policy Act of 2005 (P.L. 109-58). In addition, the Emergency Economic Stabilization Act of 2008 (P.L. 110-343) increased the tax rate to 8 cents

[14] National Pollution Funds Center, FOSC Funding Information for Oil Spills and Hazardous Materials Releases, April 2003, p. 4.

[15] 33 USC 2704(d)(4).

[16] This act increased limits to $1,900/gross ton for double-hulled vessels and $3,000/gross ton for single-hulled vessels.

[17] This rulemaking increased the limits to $2,000 for double-hulls and $3,200 for single-hulls. U.S. Coast Guard, "Consumer Price Index Adjustments of Oil Pollution Act of 1990 Limits of Liability-Vessels and Deepwater Ports," Federal Register Volume 74, No. 125 (July 1, 2009), pp. 31357-31369.

[18] Wilkinson, Cynthia et al., "Slick Work: An Analysis of the Oil Pollution Act of 1990," Journal of Energy, Natural Resources, and Environmental Law, 12 (1992), p. 188.

[19] Congress, House Committee on Merchant Marine and Fisheries, Report accompanying H.R. 1465, Oil Pollution Prevention, Removal, Liability, and Compensation Act of 1989, 1989, H.Rept. 101-242, Part 2, 101st Cong., 1st sess., p. 35.

[20] Omnibus Budget Reconciliation Act of 1986 (P.L. 99-509).

[21] The Clean Water Act Section 311(k) revolving fund; the Deepwater Port Liability Fund; the Trans-Alaska Pipeline Liability Fund; and the Offshore Oil Pollution Compensation Fund.

[22] Omnibus Budget Reconciliation Act of 1989 (P.L. 101-239). Other revenue sources for the fund include interest on the fund, cost recovery from the parties responsible for the spills, and any fines or civil penalties collected.

[23] The tax is imposed on (1) crude oil received at U.S. refineries, paid by the operator of the refinery; and (2) imported crude oil and petroleum products, paid by the person entering the product for consumption, use, or warehousing. See 26 USC 4611.

through 2016. In 2017, the rate increases to 9 cents. The tax is scheduled to terminate at the end of 2017.[24]

Under the original tax legislation (the Omnibus Budget Reconciliation Act of 1989 (P.L. 101-239)), the per-barrel tax would be suspended in any calendar quarter if the fund balance reached $1 billion, restarting again if it dipped below that number. With the Energy Policy Act of 2005 (P.L. 109-58), Congress raised this threshold from $1 billion to $2.7 billion. The Emergency Economic Stabilization Act of 2008 repealed the requirement that the tax be suspended if the unobligated balance of the fund exceeded $2.7 billion.

As illustrated in Figure 1*, the fund was projected (in May 2009) to reach approximately $3.5 billion in FY2016. Earlier this year, the Office of Management and Budget (OMB) estimated an (unobligated) balance of $1.575 billion in the trust fund by the end of FY2010.[25]

Trust Fund Vulnerability and Liability Limits: Considerations for Congress

A primary purpose of the Trust Fund is to reimburse persons for removal costs and/or damages that exceed the responsible parties' liability limits. For example, if a spiller's liability limit is determined to be $100 million, and the total costs of the incident equal $500 million, the trust fund could reimburse parties for the difference (in this case $400 million). However, OPA established a per-incident expenditure cap. The maximum total amount available for each incident is $1 billion. Within this $1 billion limit, natural resource damage awards cannot exceed $500 million. Such a scenario has not occurred under the OPA framework.

A significant spill, particularly one that impacts sensitive environments and/or areas of substantial human populations, could threaten the viability of the fund. As one reference point, the Exxon Valdez spill tallied approximately $2 billion in cleanup costs and $1 billion in natural resource damages (not including third-party claims)-in 1990 dollars. Punitive damage claims were litigated for more than 12 years, eventually reaching the U.S. Supreme Court in 2008 (Exxon Shipping v. Baker). Plaintiffs were eventually awarded approximately $500 million in punitive damages.[26] An additional $500 million in interest on those damages was subsequently awarded.

These issues raise a central policy question: how should Congress allocate the costs associated with a major, accidental oil spill? Under the existing framework, responsible parties (i.e., owners/operators of vessels and facilities) are liable up to their liability caps (if applicable); the trust fund, which is funded primarily through the tax on the oil industry, covers costs above liability limits up to the per-incident cap ($1 billion). Statements from OPA's legislative history suggest that drafters intended the fund to cover "catastrophic spills."[27]

Costs (including, for example, natural resource damages, economic losses, etc.)[28] beyond this perincident limit could be addressed in several ways. One mechanism would be for parties to use state laws. OPA does not preempt states from imposing additional liability or requirements relating to oil spills, or establishing analogous state oil spill funds (33 U.S.C. 2718). OPA legislative history and statements from OPA drafters[29] indicate that state laws and funds would supplement (if necessary) the federal liability framework under OPA. Alternatively, existing federal authorities could be used to provide assistance in some circumstances. For example, an emergency declaration under the Stafford Act would appear a potential approach for the current situation, because it is intended to lessen the impact of an imminent disaster. A declaration in the context of a manmade disaster is unprecedented: during the Exxon Valdez spill, the President turned down the governor of Alaska's two

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[24] Section 405 of P.L. 110-343.

* Figure has been retained in committee files.

[25] Office of Management and Budget, Budget of the U.S. Government for Fiscal Year 2011, Appendix, p. 548.

[26] Note that the original (1994) district court award was for $5 billion.

[27] U.S. Congress, House Committee on Merchant Marine and Fisheries, Report accompanying H.R. 1465, Oil Pollution Prevention, Removal, Liability, and Compensation Act of 1989, 1989, H.Rept. 101-242, Part 2, 101st Cong., 1st sess., p. 36.

[28] Although offshore facilities are liable for all removal costs, liability for removal costs for other responsible party categories (e.g., tank vessels, onshore facilities) is limited. Thus, a significant oil spill from a tank vessel could potentially encounter the per-incident trust fund cap, based solely on its response costs.

[29] See George Mitchell, "Preservation of State and Federal Authority under the Oil Pollution Act of 1990," Environmental Law, Vol. 21, no. 2 (1991).

requests for an emergency declaration.[30] Regardless, other federal authorities may provide mechanisms for assistance.[31]

In addition, Congress may consider modifying this liability framework. Potential options for Congress include (but are not limited to):

1. Increase the liability limits, so that the responsible party would be required to pay a greater portion of the total spill cost before accessing trust fund dollars (e.g., S. 3305, introduced May 4, 2010, by Senator Menendez).
2. Increase the per-barrel oil tax to more quickly raise the fund's balance. Concurrently, Congress could remove or raise the per-incident cap on the trust fund.
3. Authorize "repayable advances" to be made (via the appropriations process) to the trust fund, so that the fund would have the resources to carry out its functions (cleanup efforts, claim awards). Up until 1995, the fund had this authority, in order to ensure it could respond to a major spill before the fund had an opportunity to grow (via the per-barrel tax). S. 3036 (introduced May 4, 2010, by Senator Menendez) would take this approach. This proposal would allow unlimited advances.

Thank you again for invitation to appear today. I will be pleased to address any questions you may have.

The CHAIRMAN. Thank you very much, Mr. King.

STATEMENT OF RAWLE O. KING, ANALYST IN FINANCIAL ECONOMICS AND RISK ASSESSMENT, CONGRESSIONAL RESEARCH SERVICE

Mr. KING. My name is Rawle King. I'm in analyst in financial economics and risk assessment at the Congressional Research Service.

CRS has been asked by the committee to provide testimony on financing recovery from large-scale natural disasters and to review the amount of insurance that is likely to become available from the global commercial insurance market for third-party pollution liability damages facing operators of offshore energy facilities in the aftermath of the Deepwater Horizon accident.

In the aftermath of this event, one major issue that Congress may wish to deliberate upon is the willingness of the commercial insurance industry to participate in the Oil Spill Financial Requirement Program. Given the proposed increase in the limit of liability required under OPA to $10 billion and also the required evidence of financial responsibility to some level that is yet to be determined.

Some insurance market experts have asserted that the potential capacity for third-party liability commercial insurance that is available to meet the oil spill financial requirements is approximately in the range of $1.5 billion. This amount is likely to be far below the oil spill financial responsibility requirement for the proposed $10-billion liability limit.

Companies that engage in oil spill and gas exploration, drilling, and production face many risks. In general, the offshore energy business in the Gulf of Mexico involves risks that can be classified in 5 broad categories, whether it's weather perils, marine perils, drilling perils, production perils, political-risk perils. The Deep-

[30] The rationale for the turndowns was that a declaration by the President would hinder the government's litigation against Exxon that promised substantial compensation for the incident. See CRS Report R41234, Potential Stafford Act Declarations for the Gulf Coast Oil Spill: Issues for Congress, by Francis X. McCarthy.

[31] For example, see the amendment in the nature of a substitute to H.R. 4899 (Supplemental Appropriations Act, 2010) reported from the Senate Committee on Appropriations May 14, 2010 (S. Rept. 111-188).

water Horizon incident appears, to some, to have resulted from the drilling peril, a drilling peril involving a blowout preventer.

The insurance underwriting of offshore energy facilities is among the most difficult and complex commercial property and liability risk to insure, especially in the Gulf of Mexico, where hurricanes often damage platform and overseas—undersea pipeline. The offshore oil and gas insurance market, a specialty insurance market, with about $3.5 billion in annual premiums, offers insurance coverage for blowout—control of blowouts, the cost of drilling in deep water, and, in the event of a blowout, the cost of redrilling.

Given the time that has been allotted to me, I would like to delve quickly into the insurance requirements. Under Section 1016 of OPA, parties responsible for the offshore facilities must establish and maintain financial responsibility capability to meet their liabilities for removal costs and damages caused by oil discharge from an offshore facility and associated pipelines. This financial responsibility is demonstrated in various ways, including surety bonds, guarantees, letters of credit, and self-insurance, but the most common method by means to achieve this requirement is through insurance certificates. The problem has been that—going forward, is that—by the way, the market, thus far, has been in the soft market, so insurance was readily available. The problem now is the limited capacity in the global commercial insurance market to meet the demands, going forward. This is the fundamental problem. How will the offshore energy companies meet their insurance requirement, going forward, given the limited capacity that stands behind the insurance that is sold in the commercial marketplace?

So, it becomes an availability issue. To some extent, it becomes an insurability issue, given the strict liability provisions in the OPA statute.

I'd like to deal with 2 distinct points, in terms of the insurance availability issue. Some insurance—just based on economics of supply and-demand principles, and the fallout from possibly the worst damaging oil spill in the Nation's history, one would expect that the supply of insurance coverage for new financial responsibility requirements to only be available at a higher price. We've heard, today, and quite naturally, the cost of insurance has gone up dramatically. Given a limited supply of insurance, increased demand for the coverage, you would expect prices to go up. It may go up, and also the insurance may not be available at all.

So, if the past is an indication of the future, private commercial insurers concerned about the potential for future massive environmental-related damages may be reluctant to commit financial capital to underwrite unknown new risk in the post-Deepwater Horizon environment until there's greater clarity on the legislative and the legal climate. Insurers simply need to collect the necessary data for evaluation of this risk associated with the severity of the losses that are unknown at this time.

So, in conclusion, given the magnitude of losses and uncertainty about future profitability in the energy insurance business, a hard insurance—energy insurance market, where there's scarcity of coverage and high prices, may emerge following this incident.

Many insurance market experts would support a more efficient, I believe—and based—this is based on my research, looking at the catastrophe risk and how to finance this risk. Given the limited capacity that's available currently in the energy insurance market, that is a specialty market, that generates roughly $3.5 billion in premium, that is a small market, relative to the whole global insurance marketplace.

Most experts would believe that what is needed is a more efficient predisaster risk-financing approach to managing and financing large-scale oil spill disasters.

So, what I'm saying is, the current way of insuring the risk and transferring it to the reinsurance market, it's limited. So, the ability now to expand the liability coverage and expect the oil companies to go into the small—relatively small insurance market, the capacity is not there.

So, what—and it may be out of the—outside of the jurisdiction of this committee, how do you expand the market for this risk? A prefinancing mechanism would involve alternative risk-financing strategies that, again, is beyond this committee, but that is how the catastrophe insurance market is moving to provide coverage through the insurance mechanism.

Thank you again for this invitation to appear today. I will be pleased to address any questions you may have.

[The prepared statement of Mr. King follows:]

STATEMENT OF RAWLE O. KING, ANALYST IN FINANCIAL ECONOMICS AND RISK ASSESSMENT, CONGRESSIONAL RESEARCH SERVICE

Good afternoon Chairman Bingaman, Ranking Member Murkowski, and Members of the Committee. My name is Rawle King. I am an analyst in financial economics and risk assessment in the Congressional Research Service (CRS). On behalf of CRS, I would like to thank the Committee for inviting me to testify here today. CRS has been asked by the committee to provide testimony on financing recovery from large-scale disasters, and to review the amount of insurance that is likely to become available from the commercial insurance market for third-party pollution liability damages facing operators of offshore energy facilities in the aftermath of the Deepwater Horizon accident. I should note that CRS does not advocate policy or take a position on specific legislation.

Introduction

Companies that engage in oil and gas exploration, drilling, and production on federal lands on the Outer Continental Shelf (OCS) face a wide range of risks, including marine environmental uncertainty, adverse exposures in drilling and construction of offshore oil wells, performance of equipment, and defects in plans and specifications. Numerous parties are involved in the U.S. offshore oil and gas exploration and development business, including lease or permit holders, drilling contractors, cementing engineers and their various sub-contractors, such as the manufacturers of the blowout preventer. In the early 1960s, a specialty energy insurance market emerged to offer pollution liability coverage for third-party property claims and cleanup and contamination risks, oil well blowouts, and redrilling.

In 1990, Congress passed the Oil Pollution Act (OPA)[1] to strengthen the safety and environmental practices in the oil and gas exploration, drilling, and production business. Under OPA, operators of offshore energy facilities must demonstrate oil spill financial responsibility (OSFR) for removal costs and damages caused by oil discharges from offshore facilities and associated pipelines. Commercial insurance is usually purchased by the facility operator to not only meet the OSFR requirements pertaining to pollution liability coverage for third-party property claims and cleanup and contamination risks, but also to protect the company itself from the financial consequences of an oil well blowout and the expenditures following the loss of well control, the cost to redrill after a blowout, and the pollution liability coverage for

[1] P.L. 101-380; 104 Stat. 484.

third-party property claims and cleanup and contamination risks and the direct physical loss or damage to platforms, rigs, and equipment.

The Gulf Coast Oil Spill

On April 20, 2010, the ultra-deepwater, semi-submersible mobile offshore oil rig Deepwater Horizon burned and sunk in the Gulf of Mexico off the shores of Louisiana. The rig was owned and operated by Transocean, a Swiss offshore drilling contractor, and leased to British Petroleum (BP). The explosion and fire killed 11 workers and injured 17 others.

According to the American Petroleum Institute, there have been 17 marine well blowouts in the United States since 1964 for a total of 248,963 barrels spilled.[2] Two blowouts have occurred in state waters and account for 5% of the total spillage. The largest of these incidents occurred in January 1969 from Alpha Well 21 off Santa Barbara, California, which spilled 100,000 barrels. The 2009 API report said the volume of U.S. well blowouts tends to be small, that is, 50% of the well blowouts involved 400 barrels of oil or less.

Table 1 places the Deepwater Horizon oil spill currently as the eighth worst offshore platform oil spill worldwide as of May 5, behind the Alpha Well 21, but its impact may be unlike any other, in terms of offshore oil pollution damages. The final cost of the Deepwater Horizon incident will likely depend on many factors, including the distance between the oil spill location and the potential impact sites along the Gulf Coast, the sea conditions, the sensitivity of affected locations to damage from oil and cleanup techniques, the availability and cost of cleanup labor, the ecosystem value attributed to the location, and socioeconomic factors such as the economic value of activities affected by the spill, and the acceptability of residual level oil contamination.[3]

Table 1. Largest International Oil Well Blowouts by Volume

(As of May 5, 2010)

Date	Name of Platform	Location	Volume of Oil Released (Barrels)
June 1979—April 1980	Ixtoc I	Bay of Campeche, Mexico	3,500,000
October 1986	Abkatun 91	Bay of Campeche, Mexico	247,000
April 1977	Ekofisk Bravo	North Sea, Norway	202,381
January 1980	Funiwa 5	Forcados, Nigeria	200,000
October 1980	Hasbah 6	Persian Gulf, Saudi Arabia	105,000
December 1971	Iran Marine intl.	Persian Gulf, Iran	100,000
January 1969	Alpha Well 21	Pacific, California, U.S.	100,000
April 2010	DeepWater Horizon	Gulf of Mexico, U.S.	est. 70,000
March 1970	Main Pass Block 41	Gulf of Mexico	65,000
October 1987	Yum II/ Zapoteca	Bay of Campeche, Mexico	58,643

[2] American Petroleum Institute, "Analysis of U.S. Oil Spillage", p. 25, Aug. 2009, located at: [http://www.api.org/Newsroom/safetyresponse/upload/Analysis__us__oil__spillage.pdf].

[3] For more information on estimating the cost of offshore oil spills see, Franklin E. Giles, "Factors in Estimating Potential Response Costs of Spills and Releases," Environmental Claims Journal, 22(1): 27-37, 2010 p. 29.

Source: American Petroleum Institute, "Analysis of U.S. Oil Spillage", p. 26, August 2009, located at: [http://www.api.org/Newsroom/safetyresponse/upload/Analysis__us__oil__spillage.pdf].

The federal government has become involved in the oil recovery efforts. The Secretary of the Department of Homeland Security Secretary, Janet Napolitano, designated the spill as a problem "of national significance" and the Minerals Management Services (MMS), the agency within the Interior Department that regulates offshore oil drilling, is actively working with the U.S. Coast Guard, in partnership with British Petroleum, community volunteers, and other federal agencies, to prevent the spread of oil and protect the environment.

Pursuant to the Oil Pollution Act of 1990,[4] the U.S. Coast Guard has named BP and Transocean as "responsible parties" for all cleanup costs including those incurred by the U.S. Coast Guard and other government employees.[5] Much of BP's losses will likely be paid through selfinsurance because BP does not purchase insurance. BP's two non-operating partners of the Deepwater Horizon project have reportedly purchased private insurance and these insurers and their reinsurers have pollution liability cleanup exposures totaling about $1.4 billion.

Hazards Facing Offshore Operating Facilities

As background, the oil and gas business has three major segments: exploration and production of oil and natural gas (the upstream); the transportation, storage, and trading of crude oil, refined products, and natural gas (the midstream); and refining and marketing of crude oil (the downstream). The U.S. Minerals Management Services (MMS) uses auctions to allocate exploration and drilling rights (leases) for oil and gas on federal lands on the Outer Continental Shelf (OCS). The federal offshore leasing program began in 1954. Companies could individually, or through a joint offer, submit a bid on areas or tracts within the federal offshore lands that are available for drilling. The winning bidder has the right, but not the obligation, to conduct exploratory drilling of the area. There is a fixed lease term during which exploration must begin to avoid having the lease revert to the government. Leases are automatically renewed if it is productive, provided the operator pays the appropriate royalty to the government. The insurance underwriting of offshore oil and gas exploration, drilling, and production facilities is among the most difficult and complex commercial property and liability risk to insure, especially in the Gulf of Mexico where hurricanes often damage platforms and undersea pipelines, and drilling and construction projects are major undertakings that require the use of large and expensive marine vessels.[6]

The offshore energy business in the Gulf of Mexico involves risks that could be classified in five broad categories:

- Weather perils that include environmental factors such as storms, wind, hurricanes, lightning, and ice/snow/freezing;
- Marine perils that include fatigue and corrosion arising from environmental conditions, collision with attendant or passing vessels, foundation failure, subsidence, and mudslides;
- Drilling perils that include surface and subsurface blowouts;
- Production perils that include fire, explosion, and equipment failure, but also construction defects and maintenance and construction activities, such as pipelaying, piling operation, and construction defects; and
- Political risks that include war risk, asset confiscation, expropriation or nationalization, and damage caused by labor dispute or by terrorists.[7]

The Deepwater Horizon incident appears to some to have resulted from a drilling peril involving a blowout preventor.

Offshore Energy Insurance Market

Insuring the liabilities of vessels was not made compulsory until the advent of the 1969 International Convention on Civil Liability for Oil Pollution Damage (CLC).[8]

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[4] P.L. 101-380, 104 Stat. 484 (33 U.S.C. 27001 et al).

[5] Potential parties to this incident include; British Petroleum PLC, BP Products North America Inc, BP America Inc. Transocean Ltd., Transocean Offshore Deepwater Inc., Halliburton Energy Services Inc., and Cameron International Corporation.

[6] For more information see, The International Oil Pollution Compensation Fund, located at: [http://www.iopcfund.org/].

[7] Mark J. Kaiser and Allan G. Pulsipher, "Loss Categories, Hazard Types in Marine Operations," Oil & Gas Journal, May 7, 2007, p. 39.

[8] See, International Convention on Civil Liability for Pollution Damage, 1969, located at: [http://www.imo.org/conventions/contents.asp?doc__id=660&topic__id=256].

At about the same time, the offshore oil and gas insurance market began offering insurance coverage for control of blowouts. Insurers would later expand to cover the costs of drilling in deeper water and, in the event of a blowout, the cost of redrilling. The main types of property and liability insurance coverage relevant to the actual causes and definitive repercussions of the Deepwater Horizon incident include:

- Offshore Physical Damage Coverage—indemnifies the insured for "all risks" physical loss or damage to fixed offshore drilling, production and accommodation facilities, including: (1) fixed offshore drilling, production and accommodation facilities; (2) pipelines; (3) subsea equipment; and (4) offshore loading.[9]
- Operator's Extra Expense (Control of Well)—The Operator's Extra Expense (OEE) insurance covers the costs of regaining control of an oil well after an underground blowout. OEE covers evacuation expenses and the property of others in the insured's care custody and control. In addition, coverage may include the redrilling of a well after a blowout to the original depth and comparable condition prior to the loss, as well as the legal expenses emanating from an incident such as the sinking of a rig, or an oil spill. With respect to sudden and accidental pollution, the offshore facility operator is also indemnified for third-party bodily injury claims, damage to and loss of third party property, and the cost of clean up and defense expenses as a result of a blowout.
- Excess Liability Insurance coverage—Excess liability insurance covers all legal liabilities that an offshore energy facility operator might encounter. It is purchased as an additional layer of coverage in excess of the OEE policy.
- Business Interruption—Covers damage to platforms, pipelines, tankers, etc. owned by the insured, and contingent business interruption, associated with damage to upstream facilities such as processing plants, trunklines, and refineries owned by third parties. This coverage is usually written in conjunction with offshore physical damage coverage on standardized forms published by Insurance Services Office (ISO) or those that resemble the ISO form.[10] Because of the standardization in contract language there tends to be more predictability in claim payments and, therefore, reduced potential litigation over contract interpretation. Companies filing a business interruption insurance claim must show that their business operation sustained actual direct physical loss of or damage to the insured property. Without this proof the business interruption claim could be denied. This, in turn, could result in extensive litigation because, as many experts agree, the consequences of an oil spill can be far reaching without any need for the oil itself to actually reach those affected.
- Workers' Compensation/Employers' Liability—Provides coverage for claims arising out of employee injuries.

Oil Spill Financial Responsibility for Offshore Facilities

As a matter of U.S. environmental policy, Congress has enacted numerous environmental laws designed to control oil pollution in the U.S. waters. Policy is implemented by federal agencies through regulations, rules, administrative orders, memoranda, and programs.[11] Acts of oil pollution are regulated (controlled) by a wide range of enforcement methods undertaken by the U.S. Environmental Protection Agency (EPA), as well as the U.S. Coast Guard that protects and enforces regulations pertaining to U.S. waters. In addition, many federal environmental regulations (standards) are delegated to the states for their implementation.

[9] Offshore drilling rigs are classified into two categories: mobile offshore drilling units (MODUs) and fixed units. MODUs are classified in terms of bottom-supported (shallow water) rigs and floating (deepwater) rigs. In bottomsupported units, the rig is in contact with the sea floor during drilling, while a floating rig floats over the site while it drills, held in position by anchors or equipped with thrusters to be dynamically positioned. Both units float when moved from one site to another. Bottom-supported units include jack ups, tenders, submersibles, and barges. Floating units include semi-submersibles and drillships. Fixed units (or platform rigs) are drilling units that are placed upon a platform or other structures. Subsea floating production systems are employed in deeper water. The Deepwater Horizon was a floating production system (FPS) or vessel that was connected to a subsea pipeline, while a floating, production, storage, and offloading vessel (FPSO) processed and stored oil on board a vessel prior to being offloaded into shuttle tankers.

[10] ISO Form CP 0030.

[11] Some of the other water programs that are not addressed in this report include the regulation of the containment of wastes, covered by the Solid Waster Disposal and CERCLA Act; the Federal Land Policy and Management Act; the Surface Mining Control and Reclamation Act; the Forest and Rangeland Renewable Resources Planning Act; the Coastal Zone Management Act; or the Marine Mammal Protection Act.

The Oil Pollution Act of 1990 (OPA) features a financial responsibility requirement and compulsory liability insurance combined with strict liability rules that strive to accomplish several things:

- Prevent oil pollution damages from offshore energy facilities;[12]
- Establish oil spill financial responsibility (OSFR) for lease holders of offshore facilities to demonstrate the capability to meet liability for possible removal costs and damages;
- Establish a standard for measuring natural resource damages (worst case oil spill for an offshore energy facility);
- Establish penalties for not complying with the Act.

Specifically, the OPA features a compulsory liability insurance structure as part of the oil spill financial responsibility (OSFR) requirement combined with strict liability rules for oil pollution damages associated with offshore energy facilities. The financial responsibility and compulsory insurance requirements provide the funds to pay for damages, and the strict liability rules allow third-party claims to be made directly against the insurer, irrespective of negligence. This regulatory structure serves to avoid time-consuming and costly litigation and the need for oil spill victims to prove negligence as the primary test of liability for oil pollution damage. The rational basis for the compulsory insurance/strict liability structure is threefold: (1) the loss, however caused, is more than the victim can be expected to bear without hardship; (2) the compensatory system is not a liability system, as such, but, instead, a means to speedily compensate oil pollution victims; and (3) the regulatory scheme needs resources from which to pay unlimited compensation.

Insurance Requirements

Under Section 1016 of the OPA, parties responsible for offshore facilities must establish and maintain oil spill financial responsibility (OSFR) capability to meet their liabilities for removal costs and damages caused by oil discharges from an offshore facility and associated pipelines. The OSFR is demonstrated in various ways including surety bonds, guarantees, letters of credit and self insurance, but the most common method is by means of an insurance certificate. The insurance certificate spells out the limit required under Section 1016 of OPA. Lease holders of a covered offshore facility (COF) must demonstrate a minimum amount of OSFR of $35 million per 35,000 barrels of "worst case oil-spill discharge" up to a maximum of $150 for COF located in the OCS and $10 million in state waters. As an illustration, a worst case oil-spill discharge volume of 35,000 barrels (bbls) requires $35 million in OSFR while a volume of 35,001 bbls requires $70 million. The MMS calculates the worst case oil-spill discharge volume for a facility. An exemption to the OSFR is provided for persons responsible for facilities having a potential worst case oil-spill discharge of 1,000 bbls or less.

Policy Issues and Analysis

In the aftermath of the Deepwater Horizon incident, one major issue that Congress may wish to deliberate is the willingness of the commercial energy insurance industry to participate in the OSFR program given the proposed increase in the limit of liability required under OPA to $10 billion and also the required evidence of OSFR to some level that is yet to be determined. If insurers were willing to participate, another question is whether the new limit of liability is supported by the availability of insurance coverage on adequate terms and conditions in the global commercial insurance market for offshore energy facilities given the insurability of future offshore oil spill hazards; and the insurance market's capacity for underwriting "catastrophe" or "peak" risks, including oil spill damages.

Future Insurability of Offshore Oil Spill Perils

With respect to the insurability of future oil spill hazards, it is beneficial to point out that in recent decades the frequency and magnitude of large-scale natural disasters have been increasing along with federal spending to mitigate future losses and compensate disaster victims. As a major source of post-disaster recovery financing, commercial insurance companies have also been called upon to pay for catastrophe-related losses, in some cases beyond their contractual policy limitations. For example, after the September 11, 2001 terrorist attacks at the World Trade Center, in-

[12] It is important to distinguish between a mobile offshore drilling unit (MODU), such as the Deepwater Horizon, and a well drilled from a MODU. A mobile offshore drilling unit (MODU) is classified as a vessel and well drilling from a MODU is classified as a covered offshore facility (COF) under the OPA. The Secretary of Transportation has authority for vessel oil pollution financial responsibility and the U.S. Coast Guard regulates the oil-spill financial responsibility program for vessels.

surers faced pressure to interpret policy language liberally with respect to war risk coverage and the number of occurrences. After some negotiation between private insurers and reinsurers, legislators, and other industry participants, which led to the passage of the Terrorism Risk Insurance Act, (a pre-disaster risk financing scheme), insurers agreed to pay claims related to the 9/11 incident. Insurers did not charge a premium to cover the risk. Other notable examples include asbestos and Superfund environmental claims (continuum triggers) and Hurricane Katrina with the water exclusion provision in homeowners' insurance policies where some policies were reinterpreted by the courts to expand coverage for water damage where coverage was explicitly excluded. Consideration of coverage expansion through the reinterpretation of insurance contract language by the courts could affect the availability of insurance for offshore energy facilities going forward.

Available Liability Insurance Capacity

The proposed increase in the limit of liability required under OPA to $10 billion and also the required evidence of OSFR to something similar could have at least three consequences in the energy insurance market. First, some insurance market experts have asserted that the global commercial insurance capacity for third party liability insurance—Operators' Extra Expense (OEE) and Excess Liabilities coverage—that is available to meet OSFR requirements is approximately in the range of $1.5 billion. Insurers make the point that the strict liability with direct access to the insurer serves to further limit overall industry capacity. The reason is that the insurer cannot control claims payment with contract terms and conditions.

The point is that the estimated $1.5 billion is likely to be far below the OSFR for the new $10 billion liability limits. Moreover, the OEE coverage provides a combined single limit for well control, well redrilling after the blowout, and sudden and accidental seepage and pollution cleanup. Thus, pollution liability and clean-up is subject to the apportionment of the combined single limit over respective risks. What this means is that operators of COF would have to prioritize the single limit: use the insurance proceeds to first hire a well control expert to retake control of the well and, if necessary, drill a new well, with the balance of the OEE insurance limits used for pollution clean-up.

Second, given basic economic supply-demand principles and the fallout from possibly the most damaging oil spill in the nation's history, one would expect the supply of insurance coverage for the new OSFR to only be available at a high price or premium, if at all. The imposition of higher strict liability limits for large-scale oil pollution could have the effect of greatly increasing the demand for liability insurance protection. This could multiply the challenges insurers would have in evaluating the risk exposure, defining reasonable limits for the coverage and calculating prices.

This means the operators may find themselves assuming or retaining higher levels of self insurance, which might affect the MMS's offshore oil and gas lease bidding and ultimately the royalties earned for the U.S. Treasury. The availability of alternative sources of capital for spreading financial risk, perhaps through catastrophe bonds or energy insurance financial futures and options (i.e., derivative financial instruments that securitizes insurance risk, turning an insurance policy or reinsurance contract into a security) could provide the added capital needed in the insurance industry to cover the higher liability and associated OSFR limits.

Third, if the past is an indication of the future, private commercial insurers may be reluctant to commit financial capital in underwriting unknown new risks in the post-Deepwater Horizon environment until there is greater clarity on the legislative and legal climate. Insurers would need to collect the necessary data for evaluation of risks associated with certain severity of loss and insurability, calculate rate, policy terms and conditions, and set appropriate limitations. Conduct of these normal activities, at least in the short term, will be affected by the uncertainty of the losses associated with the recent Gulf of Mexico oil spill.

From an insurer's perspective, one issue that may arise is the potential for future massive environmental-related (strict liability) damages which leads to the question as to whether offshore oil pollution will be insurable or insurable only with government support. Given the magnitude of losses and uncertainty about future profitability in the energy insurance business, a "hard" energy insurance market -scarcity of coverage and high prices—may emerge following the Deepwater Horizon incident. Prior to this event, the third party pollution liability market was thought to be in a "soft" phase where rates were low as a result of oversupply of capacity.[13]

[13] Willis Limited, "Energy Market Review: On the Edge of an Abyss?", March 2010, located at: [http://www.willis.com/Media__Room/Press__Releases__(Browse__All)/2010/20100324__Willis__Energy__Market__Review__24__March__2010/]

Finally, many insurance market experts would support a more efficient pre-disaster risk financing approach to managing and financing large-scale oil spill disasters. The OPA's oil financial responsibility rule is a pre-disaster risk financing strategy that, in the wake of the Deepwater Horizon incident, could come under intense pressure because of capital shortages in the insurance industry.

Again, new insurance and reinsurance companies (additional capacity) would be needed. A number of approaches could emerge to enhance access to the capital markets through new innovative financial instruments that serve as alternatives to traditional reinsurance treaties, grouped under the term alternative risk transfer or non-traditional reinsurance.

Thank you again for invitation to appear today. I will be pleased to address any questions you may have.

The CHAIRMAN. Thank you very much.

Mr. MELTZ.

STATEMENT OF ROBERT MELTZ, LEGISLATIVE ATTORNEY, CONGRESSIONAL RESEARCH SERVICE

Mr. MELTZ. Thank you, Mr. Chairman and members of the committee.

CRS is pleased to assist the committee today with its deliberations on the Gulf oil spill.

I'll just proceed to the constitutionality of S. 3305 and 3346, and try to keep the nonlawyers from glazing over.

I do want to say that my estimation of the constitutionality question is pretty close to that of the Justice Department's, although I don't know, in detail, what their arguments are.

S. 3305 would raise, from $75 million to $10 billion, in the version—last version I saw, the liability limit in OPA for damages caused by oil spills from offshore facilities, assuming no exceptions are triggered—in which case, the liability caps don't apply. The bill sets an effective date of April 15, 2010, presumably to cover the Gulf spill. This retroactivity has generated a constitutionality debate.

It is true that the Constitution disfavors retroactivity. No less than 5 constitutional provisions, which I'll get to, embody the notion that people should be able to know the law and to conform their actions accordingly. Nonetheless, each of these 5 provisions has its special purposes and its bounds, recognizing that the retroactive application of statutes can be a desirable and unavoidable means of achieving a legitimate public purpose.

CRS analysis indicates that challenges to S. 3305's retroactivity, based on 3 of the 5 retroactivity-oriented provisions in the Constitution—the Takings Clause, Substantive Due Process, and the Bill of Attainder Clause—have, at best, a modest chance of success. Claims based on the other 2—the Impairment of Contracts Clause and Ex Post Facto—have, we believe, almost no chance of success. But, the legislative history of the bill yet to be generated may affect the analysis.

Looking at the 3 provisions with at least a minimal chance of success, the taking claim, might be—could be based on various things, but likely it would be based on the extra money that a responsible party in the Gulf would have to pay out under a retroactively raised liability cap. It's—but as is often said by the Supreme Court, those who do business in a heavily regulated field cannot claim surprise when the legislative body fortifies the regulatory scheme. Most problematic for a taking claim, is that—what the courts call "generalized monetary liability" cannot be the basis of a taking claim. OPA liability for damages, is generalized monetary liability.

Second, substantive due process, as applied to economic legislation like S. 3305, imposes only a minimum rational-basis test. Making S. 3305 retroactive seems rational enough without bringing in the Gulf spill. The bill's increased liability would forego perhaps the most important application of that increased liability in a long time.

Third, to violate the Bill of Attainder Clause, a law must be punitive, meaning that the law is not rationally describable as furthering a nonpunitive purpose. But, Congress might easily assert a nonpunitive purpose for S. 3305, say, more fairly distributing the costs imposed by an oil spill between spiller and injured persons. Statements of those Members of Congress who support the bill may be reviewed carefully by a court, in this regard, for their intent.

The other 2 constitutional provisions need not detain us. The Impairment of Contracts Clause doesn't apply to the Federal Government. The Ex Post Facto Clause only applies to criminal punishment.

All in all, CRS believes that making certain assumptions as to S. 3305's legislative history, it is likely to survive constitutional challenge. Thus, BP may choose, as Associate Attorney General Perrelli said, to litigate S. 3305 under a breach of contract theory based on the lease terms.

S. 3346 increases both the civil and criminal penalty caps in the Outer Continental Shelf Lands Act, but—and like S. 3305, the bill sets a pre-enactment effective date of April 15 for the increase in the civil penalty cap. CRS is unable to see any significant reason why the constitutionality analysis of this retroactivity should be any different than for S. 3305, nor the result any different.

As for the increase by S. 3346 in the Outer Continental Shelf Lands Act criminal penalty cap, the bill states no effective cap. I understand there may have been an earlier version of the bill which stated a pre-enactment effective date. But, the current version, I understand, states no effective date for the criminal—increase in the criminal penalty cap. Hence, a court would almost certainly assume that the effective date is the date of enactment. A date-of-enactment effective date also avoids any ex post facto infirmity.

Thank you very much, and I'll be glad to take questions.

[The prepared statement of Mr. Meltz follows:]

STATEMENT OF ROBERT MELTZ, LEGISLATIVE ATTORNEY, CONGRESSIONAL RESEARCH SERVICE

Mr. Chairman and Members of the Committee: the Congressional Research Service is pleased to assist the Committee with its deliberations as to the appropriate congressional response to the Deepwater Horizon oil spill in the Gulf of Mexico. I am an attorney with the American Law Division of CRS, where I specialize in environmental and Fifth Amendment takings law. This statement (1) gives a brief overview of the liability scheme in the Oil Pollution Act of 1990 (OPA); (2) discusses the constitutionality of S. 3305, which would retroactively raise the OPA liability cap for damages caused by oil spills from offshore facilities; and (3) discusses the constitutionality of S. 3346, which would raise the civil penalty cap under the Outer Continental Shelf Lands Act (OCSLA) retroactively and raise the criminal penalty cap therein apparently as of bill enactment.

Brief Overview of OPA Liability

OPA Title I serves to consolidate existing federal laws governing oil spill liability, expand their coverage, increase liability, strengthen federal response authority, and establish a fund to ensure that claims are paid up to a stated amount. 33 U.S.C. §§ 2701-2720. In its central provision, Title I states that each "responsible party" for a vessel or facility from which oil is discharged into or upon U.S. navigable waters, adjoining shorelines, or the exclusive economic zone is liable for the resulting "removal costs" and "damages." OPA § 1002(a). Removal costs are covered regardless of whether incurred by the United States, a State, an Indian tribe, or a private person. OPA § 1002(b)(1). Damages include those for natural resource injury (recoverable only by governments); real or personal property injury and resulting economic losses (recoverable only by the owner or lessee thereof); loss of subsistence use; governmental loss of revenues, as from net loss of taxes and royalties; loss of profits or impairment of earnings capacity (recoverable by any claimant, not just those who own oil-contaminated property); and the net costs of providing increased or additional public services during or after removal activities. OPA § 1002(b)(2).

The OPA liability scheme is a stringent one, modeled as it is after Clean Water Act section 311 and Comprehensive Environmental Response, Compensation, and Liability Act (Superfund Act) section 107. As with those statutes, OPA liability is strict, and joint and several, OPA § 1001(17) (incorporating the Clean Water Act liability standard), and is subject to but a handful of defenses. OPA § 1003(a)-(c). On the other hand, softening the liability scheme, the Act preserves the Clean Water Act liability caps in most cases (though raising them) and has been held to preclude punitive damages imposed under federal law. OPA § 1004(a); South Port Marine, LLC v. Gulf Oil Limited Partnership, 234 F.3d 58 (1st Cir. 2000). Of special interest in connection with the recent Gulf spill, the responsible party at an offshore facility (such as the British Petroleum wellhead) is subject to unlimited liability for removal costs, but is granted a cap of $75 million on 2 the above-listed categories of "damages." OPA § 1004(a)(3). This cap has remained unchanged since OPA's enactment twenty years ago.

Two other things should be said about this $75 million cap (and others in OPA). First, it applies per incident and per responsible party. It is not certain at this point that the Deepwater Horizon spill involves only one responsible party and only one incident, so there is a possibility the $75 million will be multiplied. Second, the liability cap (and others in OPA) is easily eliminated; if any of five exceptions apply, the cap is forfeited and liability for damages is without limit. This would be the case, for example, if the Gulf spill was found to be proximately caused by a responsible party's violation of an applicable federal safety, construction, or operating regulation. OPA § 1004(c)(1)(B).

Because oil from the Gulf spill may result in removal costs and damages in foreign nations, it should be mentioned as well that OPA contains many provisions providing for foreign claimants. For example, OPA allows claims against responsible parties by foreign governments for natural resource damages, at least where the Secretary of State has certified that the foreign government provides a comparable remedy for U.S. claimants. OPA §§ 1006(a)(4), 1007(a)(1)(B).

Finally, OPA liabilities for removal costs and damages should be kept in context, as they do not exhaust the potential liabilities of parties connected to the Deepwater Horizon spill. For example, Clean Water Act section 311, 33 U.S.C. § 1251, imposes civil and criminal penalties for oil spills, and the Outer Continental Shelf Lands Act (OCSLA), 43 U.S.C. § 1350(b)-(c), contains civil and criminal penalties for, among other things, violation of OCS lease terms or the Act and its regulations. In addition, the OCSLA extends the laws of the United States, and the law of the "adjacent state" where not inconsistent with federal law, to the OCS. 43 U.S.C. § 1333(a). Thus, for example, there could conceivably be civil or criminal violations of the Endangered Species Act, Marine Mammal Protection Act, or Migratory Bird Treaty Act in connection with the Gulf spill. The Solid Waste Disposal Act, 42 U.S.C. § 6901 et seq., also may apply. See OPA § 1018(a)(2). Finally, OPA specifies that state law "imposing any additional liability or requirements with respect to the discharge of oil or other pollution by oil within such State" is not preempted. OPA § 1018(a)(1); see also § 1018(c).

Constitutionality of S. 3305's Retroactive Increase in the Offshore-Facility Liability Cap for Damages

S. 3305, titled the Big Oil Bailout Prevention Liability Act of 2010, would raise the liability limit in OPA section 1004(a)(3) for damages caused by oil spills from offshore facilities. It does so by simply striking the $75 million figure in that provision and replacing it with $10 billion, thus preserving the exceptions that, if applicable, eliminate the cap. More to the point, S. 3305 states that it would take effect

April 15, 2010, so it is plainly retroactive. It may be noted, however, that even in the absence of a pre-enactment effective date, S. 3305 could be said to have some degree of retroactivity. Even if a responsible party's payments over the current $75 million cap all go toward damages occurring after the bill is enacted, those damages stem from a pre-enactment incident and thus satisfy a common definition of retroactivity. And even were it limited to postenactment spills, S. 3305 could be said to be retroactive in some measure if those spills occur at locations under pre-enactment leases.

The retroactive nature of the cap increase invites examination of five constitutional provisions. As discussed below, claims based on three of these—the Takings Clause, Substantive Due Process, and Bill of Attainder Clause—appear to have at best a modest chance of success, while claims under two others—the Impairment of Contracts Clause and Ex Post Facto Clause—seem to have almost no chance of success. It must be stressed, however, that how the legislative history of an enacted law characterizes the predecessor bill—especially whether a broad and legitimate public purpose for the bill is convincingly set forth—may affect the analysis, especially with regard to the Bill of Attainder Clause. That legislative history, of course, does not yet exist. Further, prediction of how courts will rule when applying the broadly worded tests of constitutional law is always uncertain. Finally, based on the limited prospects of constitutional claims, the retroactive increase is more likely to be litigated, if at all, as a possible breach of British Petroleum's lease contract, an issue this testimony does not reach.

Introduction—The Constitution disfavors retroactivity. At least five constitutional provisions, noted above, embody the notion that "individuals should have an opportunity to know what the law is and to conform their conduct accordingly; settled expectations should not lightly be disrupted." Landgraf v. USI Film Products, 511 U.S. 244, 265 (1994). Nonetheless, each of these five provisions has its special concerns and is of "limited scope," id. at 267, recognizing that within reasonable bounds, the retroactive application of statutes can be an acceptable and unavoidable means of achieving a legitimate public purpose. As the Supreme Court has said——

> Retroactivity provisions often serve entirely benign and legitimate purposes, whether to respond to emergencies, to correct mistakes, to prevent circumvention of a new statute in the interval immediately preceding its passage, or simply to give comprehensive effect to a new law Congress considers salutary.

Id. at 267-268 (emphases added). Accordingly, several Supreme Court decisions in the past halfcentury to address retroactive federal statutes have found them constitutionally inoffensive.

1. Takings Clause.—A taking claim, to succeed, requires that the interest alleged to be taken is recognized as "property" by the Takings Clause. Moreover, how the analysis proceeds may depend on the type of property. Based on a limited understanding of the facts surrounding the Deepwater Horizon situation, CRS supposes that at least three interests may be implicated.

First, there is an interest in the law remaining unchanged. In the substantive due process context, this interest has long been held not to constitute a vested property interest: "No person has a vested interest in any rule of law, entitling him to insist that it shall remain unchanged for his benefit." New York Central RR Co. v. White, 243 U.S. 188, 198 (1917). More recently, takings decisions have adopted the same proposition. See, e.g., Branch v. United States, 69 F.3d 1571, 1577-1578 (Fed. Cir. 1995). Thus, the bare fact that S. 3305 would change the law existing when an offshore lease was entered into is not, of itself, a basis for a taking claim.

Second, OPA responsible parties have an interest in any money paid for damages in excess of the current OPA liability cap. Money is held to be property under the Takings Clause. Philips v. Washington Legal Found., 524 U.S. 156 (1998). Thus, an OPA responsible party would be able to argue, under the canonical Penn Central test for regulatory takings, 438 U.S. 104, 124 (1978), that S. 3305 effects a taking of its disbursements to cover damages beyond the existing liability cap. Under the Penn Central test, used by the Supreme Court for takings challenges to retroactive monetary liability, a court must examine (1) the economic impact of the government action, (2) the degree to which it interferes with reasonable, distinct investment-backed expectations, and (3) the "character" of the government action.

Each of these Penn Central factors may pose an obstacle for a taking claim based on the retroactively increased monetary liability in S. 3305. As for the economic impact factor, the Penn Central test requires that the impact be very substantial, if not severe, before this factor weighs in favor of a taking. In one case, the Supreme Court held that a retroactively imposed monetary liability amounting to 46% of shareholder equity, combined with the "proportionality" of that impact with plaintiff's conduct, was insufficient to count the economic impact factor as favoring a taking. Concrete Pipe & Products, Inc. v. Construction Laborers Pension Trust, 508 U.S. 602, 645 (1993). Thus, based on reports as to the net worth or market capitalization of British Petroleum, the potential additional liability under S. 3305—that is, the difference between $75 million and $10 billion—is likely to fall short of the Penn Central threshold, though it may not fall short as to other, smaller responsible parties (in this or future oil spills from offshore facilities).

The interference with reasonable investment-backed expectations factor often involves courts in a review of the legal landscape at the time the property interest alleged to be taken was acquired, with a view toward gauging the reasonableness of the buyer's expectations of economically exploiting that property interest. Oil and gas operations on the Outer Continental Shelf have been heavily regulated under OCSLA since the 1950s. Moreover, by 2008 when British Petroleum entered into the lease at issue here, federal oil spill liability limits had been increased, some twice and some by multiples approaching the 133-fold increase (from $75 million to $10 billion) S. 3305 would effect. As the Supreme Court said in addressing a taking challenge to retroactive monetary liability, "[t]hose who do business in the regulated field cannot object if the regulatory scheme is buttressed by subsequent amendments to achieve the legislative end." Concrete Pipe, 508 U.S. at 645, quoting FHA v. The Darlington, Inc., 358 U.S. 84, 91 (1958). The Court noted further—

> Because legislation readjusting rights and burdens is not unlawful solely because it upsets otherwise settled expectations ... even though the effect of the legislation is to impose a new duty or liability based on past acts, Concrete Pipe's reliance on [the statute in question's] original limitation of contingent liability to 30% of net worth is misplaced, there being no reasonable basis to expect that the legislative ceiling would never be lifted.

508 U.S. at 646 (emphasis added; footnotes and quotation marks deleted). Thus, a company entering into an OCS lease in recent decades faces an uphill climb in arguing that S. 3305's increase in the liability cap interferes with its reasonable expectations.

As much a barrier as the first two Penn Central factors may be to a taking challenge to S. 3305, it is the third factor, the character of the government action, that most likely will prove fatal. Broadly speaking, courts are less inclined to find a taking when the challenged government conduct merely adjusts the benefits and burdens of economic life, as does S. 3305, than when it physically invades property. More pointedly here, courts have adopted the "generalized monetary liability" principle, which demands that to be a taking, the government conduct must target specific property. The principle was first put forward by the concurring justice and four dissenters in Eastern Enterprises v. Apfel, 524 U.S. 498 (1998)—that is, by a majority of the Supreme Court. Thus, a taking claim may arise when government appropriates money from a specifically identified fund of money (such as interest on an interpleader fund). But a statute imposing a generalized monetary liability—e.g., that A pay B out of unspecified funds—is not a taking. All lower courts that have addressed this point since Eastern Enterprises have endorsed the generalized monetary liability rule. Commonwealth Edison Co. v. United States, 271 F.3d 1327, 1338-40 (Fed. Cir. 2001) (en banc); Swisher International, Inc. v. Schafer, 550 F.3d 1046 (11th Cir. 2008), cert. denied, 130 S. Ct. 71 (2009); Empress Casino Joliet Corp. v. Giannoulias, 896 N.E.2d 277 (Ill. 2008), cert. denied, 129 S. Ct. 2764 (2009). In light of the principle, it is unlikely that S. 3305's increase in the OPA liability cap for offshore facilities—an increase in generalized monetary liability—would be regarded as a taking.

Eastern Enterprises should be factually distinguished, however. There, a four-justice plurality of the Supreme Court did indeed hold a federal statute's retroactivity to effect a taking, explaining that the statute imposed severe retroactive liability (attaching new liabilities to events that occurred decades earlier) on a limited class of parties that could not have anticipated the liability, and that the extent of liability was substantially disproportionate to the company's experience in the affected field. These factual elements found by the plurality to be constitutionally offensive, at least in the aggregate, seem a far cry from the retroactivity of S. 3305. As applied to the Deepwater Horizon spill, S. 3305 needs to reach back only a short time (to April 20, 2010). Moreover, an increase in the liability limit could have been anticipated given Congress' already noted history of liability cap increases in the oil spill area. Finally, the extent of liability imposed by S. 3305 is "proportionate to the company's experience," since the added liability would be only for damages stemming from a company's own oil spills. Of course, the precedent value of Eastern Enterprises is further undercut by the fact that only a minority of the justices supported the takings analysis of the statute's retroactivity.

Note that both before and after Eastern Enterprises, every court to address the matter has rejected takings (and substantive due process) challenges to the Superfund Act, whose heightening of preexisting liability standards, extending to pre-enactment releases of hazardous substances, offers some parallel to that of S. 3305. See, e.g., United States v. Alcan Aluminum Corp., 315 F.3d 179, 189-190 (2d Cir. 2003) (collecting cases).

As a third interest that could be asserted in a taking claim, British Petroleum might allege a right under its OCS lease not to be subject to laws enacted after the lease was signed. Leases are in the nature of contracts, and contract rights generally are held to be property under the Takings Clause. See, e.g., Lynch v. United States, 292 U.S. 571, 579 (1934). That being so, British Petroleum might argue that S. 3305 is essentially an abrogation—a taking—by Congress of a contract/lease term to which the United States had agreed. Such an argument would focus on the clause in the company's lease stating that "The lease is issued subject to [the Outer Continental Shelf Lands Act, existing regulations thereunder, and certain future regulations thereunder] and all other applicable statutes and regulations." The company might contend that "all other applicable statutes" refers solely to statutes existing when the company entered into its lease—not those, such as S. 3305, enacted later on. There is solid Supreme Court support for this interpretation: in 2000, the Court interpreted the same "catchall" language in another Outer Continental Shelf lease to "include only statutes and regulations already existing at the time of the contract .." Mobil Oil Exploration & Producing Southeast, Inc. v. United States, 530 U.S. 604, 616 (2000). The argument would conclude that "all other applicable statutes" embraces the current $75 million cap in OPA, which S. 3305 abrogates.

Important here, however, is the consistent preference of the U.S. Court of Federal Claims and its appellate court, the Federal Circuit, for addressing disputes revolving around written contracts with the United States under a breach of contract, rather than a takings, theory. See, e.g., Hughes Communications Galaxy, Inc. v. United States, 271 F.3d 1060, 1070 (Fed. Cir. 2001) ("[t]akings claims rarely arise under government contracts, because the government acts in its commercial or proprietary capacity . . . "); Castle v. United States, 301 F.3d 1328, 1342 (Fed. Cir. 2002) (nothing is taken in the constitutional sense when the plaintiff, as is typical, retains the full range of breach of contract remedies). At least two challenges to congressional enactments as anticipatory breaches of pre-enactment OCSLA leases are in the reported case law. Mobil Oil, supra; Amber Resources Co. v. United States, 538 F.3d 1358 (Fed. Cir. 2008). As noted at the outset, this testimony does not reach any breach of contract issues raised by S. 3305.

2. Substantive due process.—The Due Process Clause of the Fifth Amendment has long been read to demand not only procedural due process, but substantive due process as well. Substantive due process in the realm of economic legislation—the realm of S. 3305—imposes only a very lax, highly deferential standard: that there exists a plausible rational basis which the legislative body could have had in mind linking the means chosen and the legitimate public purpose sought to be achieved. In a leading retroactivity/substantive due process decision, the Court explained——

> To be sure, insofar as the [Act being challenged] requires compensation for disabilities bred during employment terminated before the date of enactment, the Act has some retrospective effect. . . . But our cases are clear that legislation readjusting rights and burdens is not unlawful solely because it upsets otherwise settled expectations . . . This is true even though the effect of the legislation is to impose a new duty or liability based on past acts.

Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 15-16 (1976) (emphasis added). The Court did caution that "[t]he retrospective aspects of legislation, as well as the prospective aspects, must meet the test of due process, and the justifications for the latter may not suffice for the former." Id. at 17. But that burden, said the Court in a later decision, "is met simply by showing that the retroactive application of the legislation is itself justified by a rational legislative purpose." Pension Benefit Guaranty Corp. v. R.A. Gray & Co., 467 U.S. 717, 730 (1984).

It would seem that the retroactive application of the increased liability limit in S. 3305 back to the April 20 spill satisfies this test. Congress reasonably could suppose that for the foreseeable future, most of the exceedance of the current OPA liability cap would derive from this one huge spill. To exclude that spill from the bill's cap increase would compromise substantially the (assumed) public purpose of S. 3305 to lay a greater portion of economic damages per oil spill at the feet of the responsible party. Similarly, not applying S. 3305 to other existing leases (that is, confining it to leases entered into post-enactment) would greatly undercut the effectuation of that public purpose.

As noted in the takings discussion above, all substantive due process challenges to the retroactive liability scheme in the Superfund Act have been unsuccessful.

In sum, the sounder argument is that the retroactive application of the $10 billion liability cap in S. 3305 does not offend substantive due process.

3. Bill of Attainder Clause.—The Constitution's Bill of Attainder Clause bars enactments that effectively declare the guilt of, and impose punishment on, an identifiable individual or entity, without a judicial trial. See Nixon v. Administrator of General Services, 433 U.S. 425, 468 (1977). Such enactments are seen to usurp the judicial function, thereby offending separation of powers and due process. As pertinent here, the argument might be that S. 3305, by reaching back to April 15, 2010, departs from the usual prospective-only application of enactments solely to bring in one particular oil spill: the Deepwater Horizon incident. This narrow-focus retroactivity, the argument might conclude, betrays an underlying intent to punish parties responsible for that incident. Then, too, the punishments that may be found constitutionally offensive are "not limited solely to retribution for past events, but may involve deprivations inflicted to deter future misconduct." Selective Service System v. Minnesota Public Interest Research Group, 468 U.S. 841, 851-852 (1984). Thus, one can imagine an argument that S. 3305 would punish existing offshore facilities generally.

In Nixon, the Court indicated that to offend the Bill of Attainder Clause, the law must (1) single out a specific person or class and (2) be punitive. The Court then listed several indicators that a federal law is punitive. The law may impose punishment traditionally judged to be prohibited by the Clause. The law may not be rationally describable as furthering a nonpunitive legislative purpose. And the legislative history may evince a congressional intent to punish. A statute need not satisfy all these factors; rather, a court weighs them together.

Arguably, S. 3305 would meet the first, specificity requirement. One indication: the identity of the individual entity (British Petroleum) or class (responsible parties for offshore facilities generally) was easily ascertainable when the legislation was passed. We need not dwell on the specificity requirement, however, because it is likely—assuming Congress does not "evince a congressional intent to punish" in passing S. 3305—that a court would find the bill not to satisfy the second, punitive requirement. First, monetary liability for the injuries one causes is not a type of punishment historically prohibited by the Bill of Attainder Clause. Second, S. 3305 can reasonably be said to further a nonpunitive legislative purpose: attaching liability to the entity that caused the oil spill injury in lieu of the taxpayer. In language plainly relevant to the Deepwater Horizon spill, a court has noted: "[E]ven if the [law in question] singles out an individual on the basis of irreversible past conduct, if it furthers a nonpunitive legislative purpose, it is not a bill of attainder." Seariver Maritime Financial Holdings, Inc. v. Mineta, 309 F.3d 662, 674 (9th Cir. 2002). Thus, as long as the committee reports and floor debates on S. 3305 do not suggest punitive motive, the bill is unlikely to be deemed a bill of attainder. It would seem, as suggested above, that there are obvious candidates for nonpunitive purposes that Congress might put forward in the legislative history of S. 3305.

4. Impairment of Contracts Clause.—The Supreme Court has held that the Impairment of Contracts Clause in the Constitution, by its terms applicable only to the states, does not apply to the federal government indirectly through the Fifth Amendment Due Process Clause. Pension Benefit Guaranty Corp., 467 U.S. at 733. Therefore, this clause is no impediment to S. 3305.

5. Ex Post Facto Clause.—This clause prohibits Congress from passing laws attaching new negative legal consequences to pre-enactment conduct. Since the early years of the nation, the Supreme Court has construed the clause to apply only to penal legislation. Landgraf v. USI Film Products, 511 U.S. 244, 266 n.19 (1994), citing Calder v. Bull, 3 Dall. 386, 390-391 (1798). By contrast, the OPA liability to which the $75 million cap and S. 3305 apply is civil, not criminal, liability. Thus, the Ex Post Facto Clause poses no obstacle to S. 3305.

Constitutionality of S. 3346's Retroactive Increase in OCSLA's Civil Penalty Cap, and Increase in OCSLA's Criminal Penalty Cap

While S. 3305 addresses compensatory liability, S. 3346 deals with penalties. S. 3346, titled the Outer Continental Shelf Lands Act Amendments Act of 2010, would increase both the civil and criminal penalty caps under the OCSLA. 43 U.S.C. §§ 1350(b) (civil), 1350(c) (criminal). Under the bill, a person (including corporations) not complying with, among other things, any OCSLA lease term or regulation would, after the allowed period for corrective action, be liable for a civil penalty up to $75,000 per day, rather than the current $20,000 per day. Noncompliance posing a serious threat of harm must result in a civil penalty up to $150,000 for each day of violation without regard to the corrective period, rather than the current discretionary civil penalty, which appears to adopt the $20,000 per day cap. These civil-penalty amendments take effect preenactment, S. 3346 specifies, on April 15, 2010, just as S. 3305 would. Finally, under the bill a person who knowingly and willfully commits an act falling into any of four categories must, upon conviction, be punished by a criminal fine of not more than $10 million, rather than the current $100,000. The bill states no effective date for this criminal-penalty amendment.

As for the increase in OCSLA's civil penalty caps effective April 15, it would seem that the constitutionality analysis of retroactivity generally tracks that above for a retroactive increase in OPA's compensatory liability caps—and with the same caveats. That is, a taking claim is still likely to founder because there is no property right to have the law remain unchanged, because the additional money paid in fines is a generalized monetary liability not recognized under emerging case law as a basis for takings claims, and because any lease/contract right to be immune from civil penalties above the statutory cap in effect when the lease was entered into more likely would base a possible breach of contract than a possible taking.

As for the increased criminal penalty cap, the Ex Post Facto Clause calls for added analysis. Because S. 3346 states no effective date for its increase in this cap, the normal presumption is that the increase would take effect as of date of enactment. "[A]bsent a clear direction by Congress to the contrary, a law takes effect on the date of its enactment." Gozlon-Peretz v. United States, 498 U.S. 395, 404 (1991). Nothing in the bill appears to meet this high "clear direction . to the contrary" standard, so it seems very likely that the normal presumption applies.

A date-of-enactment effective date for the proposed criminal-penalty increase eliminates the ex post facto infirmity that a pre-enactment date such as April 15 would fall victim to, should S. 3346 be applied to conduct between April 15 and date of enactment. (Indeed, the avoidance of this constitutional problem is another reason a court likely would adopt a date-of-enactment effective date.) As long as the conduct to which the increased criminal penalty attaches is conduct occurring after the date of enactment, there is no ex post facto issue. Note in this regard that a statute increasing a criminal penalty cap for conduct beginning before its enactment date, but which continued beyond that date, would likely not be held ex post facto as to the postenactment-date conduct. See, e.g., United States v. Julian, 427 F.3d 471, 482 (7th Cir. 2005). Thus, if hypothetically British Petroleum knowingly and willfully began to violate a lease term or OCSLA regulation before S. 3346's enactment, that likely would not preclude punishment up to the S. 3346-increased penalty cap for the continuation of that violation after enactment.

The CHAIRMAN. OK, thank you all for your testimony.

Let me ask, starting with Mr. Ramseur, the—it would seem to me that if we follow the recommendation of the Department of Justice and eliminate any liability cap, that that brings into question, What is the purpose in setting up this—or in continuing with this Oil Spill Liability Trust Fund? I mean, if you're going to say that companies that engage in these drilling activities are liable for any and all damages, and you're going to also put in requirements for them to maintain adequate insurance or solvency to meet whatever damages might result, why would we continue with an Oil Spill Liability Trust Fund?

Mr. RAMSEUR. That's a good question. As you know, currently the trust fund serves as a backstop, if you will. If the liability is indeed capped in any particular situation, the excess amount of damages could be paid by the trust fund. But, under a scenario where liability caps do not exist, the trust fund would have different purposes. Its primary purpose, of providing immediate funds to the Federal agencies, like the Coast Guard or EPA, to respond to an oil spill, would still be necessary.

The CHAIRMAN. But, as I understand it, that would be a short-term need that—at least in the case that we're dealing with, I believe BP has said they are going to reimburse the government for those costs, and although the Oil Spill Trust Fund is—Liability

Trust Fund—is advancing funds to meet the needs right now, BP is committing to go ahead and reimburse for that. Am I right about that?

Mr. RAMSEUR. I have seen similar statements in the press, but, as others have indicated today, and is allowed under the statute, the responsible party, assuming that their liability cap remains intact—and there are various reason that can go away, as has been discussed today—down the road, the responsible party could submit a claim to the trust fund for moneys paid out in excess of their liability limit. That—I'm not sure, offhand, what that timeframe is. I can look into that further.

The CHAIRMAN. OK. It does seem to me, just thinking about it, that either we could sort of put our emphasis on eliminating limits on liability for companies that engage in these activities and have much less, if any, reliance on a Oil Spill Liability Trust Fund—that would be one regime. Another regime would be to substantially increase the amount of money in the Oil Spill Liability Trust Fund and expect, in the future, that individual companies would have somewhat limited liability—would continue to have somewhat limited liability, but the trust fund would have been funded at an—adequate levels that meet any needs that occurred. Is that a fair way to think about it?

Mr. RAMSEUR. Yes. That's the current situation. One potential policy matter Congress may consider, if you remove the liability caps—if an oil spill were to occur in the future, the current situation serves as a backstop to help people receive awards in a very short amount of time without going through litigation; and if you remove that backstop, then I'm not sure what would occur, but——

The CHAIRMAN. But, then we would be looking at the trust fund as a short-term—as a way to speed up the ability of folks to get compensated for damages done. So that if—in case someone wanted to litigate a liability—but, we still might adopt the recommendation of the Department of Justice, and go ahead and try to put in place a legal regime that ensured that the trust fund would be reimbursed, at some stage.

Mr. RAMSEUR. That's certainly one avenue to take.

The CHAIRMAN. OK.

Senator Cantwell.

Senator CANTWELL. Thank you, Mr. Chairman. Isn't one reason why we need the Oil Spill Liability Trust Fund is that we don't always know who's responsible for the spill, and so, you want somebody cleaning up the spill even before you determine liability?

Mr. RAMSEUR. Absolutely, that's one of the primary purposes of the fund, to have this access to immediate funds for a Federal response.

Senator CANTWELL. We've had that unfortunate situation in Puget Sound, so that's why I bring that up.

Mr. Meltz, if Congress tries retroactivity or a higher liability limit to the Deepwater Horizon spill, would you say that it's nearly certain its constitutionality would be challenged in court?

Mr. MELTZ. I would imagine that, given the broadness of many constitutional principles, and given that different judges of different ideological stripes take different views of the breadth of constitutional protections, it might very well be worth their while to consider a challenge.

Senator CANTWELL. If that's the case, that it is this legal gray area, wouldn't it take years to resolve through the court system?

Mr. MELTZ. It certainly could, yes. I think—I mean, initially you'd have a—you know a trial court decision, I think, saying it's constitutional. Then it would go through appeal, and possibly to the Supreme Court. So, it's a little hard to predict how many years that full spectrum of procedures could take.

Senator CANTWELL. If we look at the Exxon Valdez, it took 20, so that's an idea. So——

Thank you, Mr. Chairman.

The CHAIRMAN. All right. Thank you, all 3, for your testimony. It's been helpful to us. We appreciate it.

We'll conclude the hearing with that.

[Whereupon, at 12:22 p.m., the hearing was adjourned.]

APPENDIX

RESPONSES TO ADDITIONAL QUESTIONS

RESPONSES OF CRAIG BENNETT TO QUESTIONS FROM SENATOR MURKOWSKI

Question 1. To what extent does the Oil Spill Liability Trust Fund serve as an insurance policy for companies operating in the OCS, so that while each one may or may not be personally capable of paying for all the costs of a huge spill, the entire industry has funded an insurance policy to protect victims and taxpayers?

Answer. The Oil Spill Liability Trust Fund (OSLTF) is not an insurance policy for companies operating in the outer continental shelf (OCS). The OSLTF, established in the Treasury, is available to pay the expenses of the Federal response to oil pollution under the Federal Water Pollution Control Act (FWPCA)(33 USC §1321) and to compensate third parties for claims for oil removal costs and certain damages caused by oil pollution that responsible parties do not pay. These OSLTF uses are generally recovered from responsible parties liable under Oil Pollution Act (OPA) when there is a discharge of oil to navigable waters, adjoining shorelines, or the exclusive economic zone (EEZ).

Question 2. Can you describe the claims process for spill victims and for responsible parties in terms of whether the existing system provides compensatory relief in an adequately fast manner?

Answer. A new, independent claims process is being created with the mandate to be fairer, faster, and more transparent in paying damage claims by individuals and businesses. To assure independence, Kenneth Feinberg, who previously administered the September 11th Victim Compensation Fund, will serve as the independent claims administrator.

Question 3. Has BP taken any action that indicates it may be reluctant or slow to pay any claims for compensatory damages related to this spill?

Answer. The Coast Guard has received complaints about BP's claims process, and we are working to address those complaints. On June 8, for example, Admiral Allen wrote to BP, "[w]e need complete, ongoing transparency into BP's claims process including detailed information on how claims are being evaluated, how payment amounts are being calculated, and how quickly claims are being processed."

Question 4. Has BP made any claims against the Oil Spill Liability Trust Fund?

Answer. BP has not made any claims against the Oil Spill Liability Trust Fund (OSLTF) in the context of this spill.

Question 5. If the responsible party were to make claims against the fund and the fund were depleted by a major spill, would it be useful to have a mechanism whereby the fund could take a loan from the Treasury to temporarily give the fund what it needs?

Answer. We would want to engage more substantively on this topic before making a recommendation.

Question 6. How much experience does your office at National Pollution Funds Center have in dealing with claims from major spills that affect so many lives?

Answer. National Pollution Fund Center (NPFC) has 19 years of experience in adjudicating claims, but this case is unprecedented in its size and scope.

RESPONSES OF CRAIG BENNETT TO QUESTIONS FROM SENATOR SESSIONS

Question 1. Are the current levels of financial responsibility sufficient in a worst case scenario situation for drilling on the OCS?

Answer. The Gulf Oil Spill necessitates a reassessment of the current levels of financial responsibility sufficient to address a worst case scenario. For this reason, the Administration has proposed working with Congress to appropriately adjust the limitations of liability for responsible parties.

Question 2. In your opinion, do the current liability caps need to be increased?

Answer. Yes. The Administration supports a significant increase in liability for offshore oil and gas developers whose actions pollute our oceans and coastlines and threaten our wildlife and other natural resources. The Administration has proposed removing caps on liability under the Oil Pollution Act for oil companies that engage in offshore drilling, and looks forward to working with Congress to increase various limits and caps as appropriate.

Question 3. What are the Constitutional or breach of contract issues in holding a responsible party retroactively liable? Is there procedure to allow retroactive legislation?

Answer. The Coast Guard defers to the Department of Justice with regard to any and all constitutional and breach-of-contract issues surrounding any legislative proposal to make a party liable retroactively or alter the terms of liability retroactively.

Question 4. In your opinion, are there factors that should be considered when assessing strict liability limits? For example: past safety issues/violations, water depths, pressure depths, or natural gas vs. oil production.

Answer. Per our attached limit of liability report, we consider the costs of spills to be the critical factor in determining the adequacy of Oil Pollution Act liability limits.

RESPONSES OF DAVID J. HAYES TO QUESTIONS FROM SENATOR MURKOWSKI

Question 1. Secretary Salazar testified that the number for the strict liability cap should be determined in such a way as to not be arbitrary, but to ensure that the OCS not be only accessible to "the BP's of the world." What are some factors in determining what the strict liability cap, above cleanup costs and lawsuits, should be?

Answer. The Administration is convinced that the current liability framework is simply inadequate to deal with the potentially catastrophic consequences of oil spills.

As noted at this hearing and subsequent others, the Administration has supported significant increases in liability for offshore developers whose actions pollute our oceans and coastlines and threaten our wildlife and other natural resources, including removing caps on liability for oil companies engaged in offshore drilling. Companies participating in such risky activities should have every incentive to maximize safety and must bear full responsibility for all of the damages their actions impose on individuals, businesses, and the environment. The liability caps for other activities covered by OPA, which have not been updated in some time, should be reviewed and increased as appropriate to more fully reflect the risks associated with those activities.

In testimony for this hearing, the Department of Justice raised several factors to be considered in developing appropriate caps and transition rules for some of the activities that are covered by OPA. These included:

- ensuring that the liability rules provide the appropriate incentive for companies working in this field to fully account for the damages their actions may cause and to mitigate the risks of a catastrophic event;
- establishing a legal framework that provides confidence that an individual or business harmed by an oil spill will be able to seek and receive fair compensation, and that the trustees charged with protecting our precious natural resources can secure adequate restoration and other compensation for any harm done to those resources;
- considering ways in which new liability rules may affect the structure of the offshore oil industry and the number of market participants; and
- analyzing how changes in the caps will interact with the current liability structure under OPA.

Question 2. Is there an energy forecast and/or economic analysis being conducted by the Interior Department in terms of what the impact would be on Gulf of Mexico production and exploration under the legislation proposed to raise the strict liability caps under OPA '90?

Answer. The Administration is looking at a number of factors, including how changes in liability will impact industry structure and markets.

Question 3. How much of the current exploration and production in the outer Continental Shelf is currently undertaken by "independent" companies?

Answer. The relevant regulations do not require this information when a company qualifies and the agency does not maintain information in this fashion. However, relying on institutional knowledge from the Region, oil production in 2009 was approximately 570 million barrels with major companies accounting for about 65 percent (e.g., BP, Shell, and Chevron); independents and smaller companies responsible for approximately 25 percent; and National Oil Companies responsible for the remaining 10 percent.

For natural gas production in the Gulf during that same period, total production was approximately 2.5 trillion cubic feet, with the majors accounting for approximately 31 percent; independents and smaller companies responsible for 60 percent; and National Oil Companies for the remaining 9 percent of production. Exploration is a necessary precursor to production, and many successful exploration wells are later converted to development wells due to the high cost of drilling and completing these wells.

The GOMR website, http://www.gomr.boemre.gov/homepg/offshore/offshore.html, has information available to the public on exploration plans, well permits, wells drilling, and development plans.

RESPONSES OF DAVID J. HAYES TO QUESTIONS FROM SENATOR SESSIONS

Question 1. Are the current levels of financial responsibility sufficient in a worst case scenario situation for drilling on the OCS?

Answer. For facilities located wholly or partially in the OCS the applicable amount of oil spill financial responsibility to be assured ranges from $35 million, for worst case oil spill discharge volumes of over 1,000 to up to 35,000 barrels, to $150 million for worst case oil spill discharge volumes of over 105,000 barrels. Responsible parties must provide financial responsibility certification by surety bond, insurance, self-insurance or guarantee. Coverage must be continuously maintained by the responsible party for all its leases, permits, and rights of use and easements.

While the United States has one of the most comprehensive offshore oil and gas regulatory regimes in the world, we recognize there are many areas that would benefit from careful review and improvement. We are awaiting and will carefully review the recommendations of the special Presidential commission that has been established once the commission has completed its review. However, the Deepwater Horizon oil spill response effort already has required the expenditure of funds far in excess of these amounts. The Administration supports increasing the required amount of financial responsibility for offshore facilities.

Question 2. In your opinion, do the current liability caps need to be increased?

Answer. Yes. The Administration has stated that the current liability caps are inadequate to deal with the potentially catastrophic consequences of oil spills. Removing the arbitrary limitation on liability for offshore development will create incentives for industry to comply with new standards and seek out and implement best practices for safety. The Administration strongly supports the repeal of the limit on damages liability for offshore drilling.

Question 3. What are the Constitutional or breach of contract issues in holding a responsible party retroactively liable? Is there procedure to allow retroactive legislation?

Answer. The Department defers to the Department of Justice for information related to the legal issues raised in this question.

Question 4. In your opinion, are there factors that should be considered when assessing strict liability limits? For example: past safety issues/violations, water depths, pressure depths, or natural gas vs. oil production.

Answer. As noted above, the current liability caps are inadequate to deal with the potentially catastrophic consequences of oil spills.

The Administration supports removing arbitrary limitation on liability for offshore development, which will create incentives for industry to comply with new standards and seek out and implement best practices for safety. Companies participating in risky activities should have every incentive to maximize safety and must bear full responsibility for any damages their actions impose on individuals, businesses, and the environment. The liability caps for other activities covered by OPA, which have not been updated in some time, should be reviewed and increased as appropriate to more fully reflect the risks associated with those activities.

In testimony for this hearing, the Department of Justice raised several factors to be considered in developing appropriate caps and transition rules for some of the activities that are covered by OPA. These included:

- ensuring that the liability rules provide the appropriate incentive for companies working in this field to fully account for the damages their actions may cause and to mitigate the risks of a catastrophic event;
- establishing a legal framework that provides confidence that an individual or business harmed by an oil spill will be able to seek and receive fair compensation, and that the trustees charged with protecting our precious natural resources can secure adequate restoration and other compensation for any harm done to those resources;

- considering ways in which new liability rules may affect the structure of the offshore oil industry and the number of market participants; and
- analyzing how changes in the caps will interact with the current liability structure under OPA.

RESPONSES OF RAWLE O. KING TO QUESTIONS FROM SENATOR MURKOWSKI

Question 1. Your testimony states that many insurance market experts would support a more efficient pre-disaster risk financing approach to managing and financing large-scale oil spill disasters. Is this feedback you've received directly from energy insurers or is it a general sense you've detected?

Answer. Since the 1990s, financial markets have increasingly been used as a major tool of the transfer and mitigation of a variety of global risk, including oil spill risks. A pre-disaster risk financing approach, rather than a post-disaster risk financing regime, could be supported by insurance market experts on behalf of operators of offshore energy facilities given: (1) the similarity of the risks between a catastrophic oil spill (a man-made disaster) and natural catastrophic risks (such as a major earthquake striking a major West Coast city or a Category 4 hurricane striking Miami), since both events cause widespread destruction of homes, businesses, and public infrastructure in the impacted geographic areas; (2) the limitations in the commercial insurance market capacity to meet future demand for offshore energy insurance in the aftermath of the Deepwater Horizon oil spill incident; and (3) the enormous up-front self-insurance capital that operators of offshore energy facilities will likely be required to show as part of their oil spill financial responsibility (OSFR) requirements.

Oil spill risk could be considered a "peak" risk similar to earthquake or hurricane risk in that it cannot be currently covered adequately by traditional insurance and reinsurance. An oil spill can be classified as such for several reasons: (1) they are low probability, high severity events; (2) individual exposures are correlated; (3) there are a limited number of individual risk exposures (infrequent major oil spills) to allow the use of statistical predictions of future losses; (4) actions of operators of offshore energy facilities could affect the probability that a loss will occur; (5) losses are not predictable, preventing insurers from setting premiums properly; and (6) risks cannot be pooled over a short period of time so that one year's premiums covers one year's losses. Traditional insurance principles suggest that the risk of a major oil spill would meet these six criteria and, therefore, might be considered uninsurable, and alternative risk transfer or financing strategies could be deemed appropriate.

Question 2. What would a more efficient pre-disaster risk financing approach look like? For instance, would it be consistent with risk financing practices for laws to consider different risks that may exist between shallow water rigs dealing purely with dry natural gas as opposed to a deepwater oil rig?

Answer. Going forward, investment bankers, financial engineers, insurers and reinsurers could create reinsurance sidecars and catastrophe bonds for operators of offshore energy facility to manage and finance their oil spill risk exposure. The challenge for Congress might be to help the private sector address several issues: (1) the apparent incompatibility between the "long-tail" nature of oil spill liabilities (defined as claims that are filed long after the accident or event occurred) and potential investors' apparent desire for short-term certainty with respect to the investment return; (2) the fact that insurance-linked securities (ILS) have been more expensive than traditional reinsurance and can take longer to issue then buying reinsurance; (3) insufficient investor interest; and (4) the lack of liquidity and need for a secondary market in which these instruments could be traded.

The Deepwater Horizon oil spill incident is likely to precipitate a shortage of financial capacity in the offshore energy insurance market. The financial industry could respond to this situation by issuing innovative products designed to spread the excess oil spill risk more widely among international investors (risk securitization). The development of innovative ILS and other financial instruments are being used to increase risk transfer, diversify risk in capital markets and increase the pool of capital available for insurance.

Congress may wish to consider the feasibility of catastrophe bonds and reinsurance "sidecars," a type of contingent risk structured financing, for spreading third-party liability risks among capital market investors. Insurers have used catastrophe bonds to manage their exposure to natural disasters by transferring potential losses to investment funds. Investors typically receive a high rate of interest but risk losing part of the principal if a catastrophe occurs. There have been only a handful of companies outside the insurance and reinsurance sectors that have sponsored

ILS. The precedent for an ILS in the oil spill risk financing market is a catastrophe bond (Avalon Re) brought to market in 2005 by Goldman Sachs on behalf of Bermuda-based casualty insurer Oil Casualty Insurance, Ltd. (OCIL).[1] OCIL is an excess liability insurance company formed by energy companies in 1986 at a time when the commercial markets had ceased to provide adequate insurance coverage for liability risk. OCIL sold three $135 million tranches of catastrophe bonds via Cayman Islands-based vehicle Avalon Re in 2005. The OCIL catastrophe bond, however, was considered too expensive and investors did not fare well because the trigger amounts were considered too low. On September 9, 2009, OCIL bought back $7 million of its catastrophe bond at $850 per $1,000 principal amount, equivalent to 85 cents on the dollar, to repurchase part of Avalon Re Ltd's $135 million Class B variable rate notes due June 6, 2008.

The solution could be the development of a "parametric" trigger. A parametric trigger would be popular with investors because it dictates an insurance payment when a predetermined level of catastrophe occurs. For example, an insurance payment may be required if there is a specific amount of oil spilled. The parametric trigger would work for investors because of the long-tail nature of the oil spill risks and their desire not to wait years for the oil spill clean-up to be completed and costs finalized before they reclaim their principal. A parametric trigger would be transparent and involve probabilities that are relatively easy to calculate, rather than an actual loss trigger, which in the case of oil spill could take years to determine.

Figure 1* illustrates a typical reinsurance sidecar transaction that could be created to increase the pool of capital available for insurance. The sidecar allows a ceding insurer or reinsurer to transfer oil spill risks to a newly licensed reinsurance company that assumes risk, collects premiums, and pays claims losses to the ceding insurer or reinsurer via a reinsurance agreement.

Reinsurers typically create sidecars by transferring policies and premiums to a special purpose reinsurer (SPR) that uses them as collateral for bonds, loans, and equity. This allows the sidecar to diversify (or spread) individual reinsurers' risk among the global reinsurance marketplace. Proceeds from the security offering, as well as premium and investment income, are transferred to a collateral trust, which invests the proceeds and disburses funds to the ceding insurer or reinsurer on behalf of the sidecar to pay claims. Funds are also disbursed to the holding company, via the sidecar, to pay interest on debt and dividends, if any, to the shareholders. Sidecar payouts are determined via the reinsurance agreement contract between the ceding company and the sidecar, and triggered by the loss experience of the ceding company.

Hedge funds, private equity investors and other institutional investors provide the bulk of the funds via equity and debt financing to capitalize the alternative risk transfer instruments. Thus, capital market investors were able to get into the lucrative post-Katrina reinsurance business without having any underwriting loss experience from the devastating loss event. In these cases, investors agreed to invest the funds for 2 to 3 years and typically earned 20% to 30% or more return on their investment. At the end of the time period, the reinsurer receives a commission, investors get interest and dividend payments from the collateral trust, when the sidecar expires (assuming that all of the capital has not been used to meet claims.)

Another pre-disaster financing option to increase risk transfer would be the creation of an "association-type" captive that would be owned by a trade, industry, or service group for the benefit of its members or a "group-type" captive that is jointly owned by a number of oil companies to provide a vehicle to meet a common insurance need. Major oil companies typically organize captives in countries that have a favorable tax regime with more relaxed controls. The tax advantage allows the oil company to have a larger percentage of the premium for claims payments. The association or group captive could assume the oil spill risk, purchase reinsurance to spread the risk to another global insuring entity, or transfer the risk to the financial markets through innovative risk transfer or financing instruments that are traded either on an electronic exchange or over the counter.

A final point about insurance arrangements is worthy of mention. The major oil companies that self insure their cleanup costs typically establish a captive insurance company offshore to insure their international oil and gas assets and risks. These captives are usually located in a special purpose vehicle (SPV), which prevents the parent owner from having to make public the firm's assets or liabilities. Such is the case for Jupiter Insurance LTD, BP's captive insurance company.

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[1] Bermuda Insurance Update, "First Casualty Bond Launched," 2005, vol. 4, located at [http://www.ocil.bm/ocil/documentcenter/Media%20Articles/BDA%20Ins.%202005.pdf].

* All figures and tables have been retained in committee files.

Question 3. On Page 4 of your testimony you list "Business Interruption" as one of the relevant types of coverage available for offshore facilities. Is this coverage readily available and commonly purchased by offshore operators?

Answer. Operators of offshore energy facilities maintain various types of marine insurance including business interruption (BI) insurance coverage. BI indemnifies the insured for lost net income that would have been earned had the damage not occurred, as well as for refunding fixed expenses incurred during the period of indemnity. Companies filing a business interruption insurance claim must show that their business operation sustained actual direct physical loss of or damage to the insured property. Without this proof the BI claim could be denied because, as many experts agree, the consequences of an oil spill can be far reaching without any need for the oil itself to actually reach those affected. Contingent business insurance coverage provides payments for damages based upon loss of income due to damage to upstream facilities such as processing plants, trunklines, and refineries owned by third parties but upon which the insured's income depended. This coverage is usually written in conjunction with offshore physical damage coverage on standardized forms published by Insurance Services Office, Inc. or those that resemble the ISO form. BI coverage is thought to be readily available to offshore operators through mutual insurance associations (P&I Clubs).

Question 4. Which companies (or how many companies) would still meet the financial qualification to operate in the Gulf of Mexico if the strict liability cap for economic damages was raised to $10 billion and no other changes were made to the financial assurance formula?

Answer. This question is beyond the scope of the CRS panel's expertise. However, a May 2010 report by Wood Mackenzie Ltd., entitled, Deepwater Horizon Tragedy: Near-Term and Long-Term Implications in Deepwater Gulf of Mexico, indicated that "the increase in the cap on oil companies' liability for oil spill to $10 billion would not deter global supermajors and national oil companies from operating in the Gulf of Mexico, but many U.S. independents and their investors may not be able or willing to expose themselves to such an amount." For example, BP has indicated in its U.S. Securities and Exchange Commission Annual Report on Form 20-F, 2009, that "the group generally restricts its purchase of insurance to situations where this is required for legal or contractual reasons. This is because external insurance is not considered an economic means of financing losses for the group. Losses are therefore borne as they arise, rather than being spread over time through insurance premiums with attendant transaction costs. This position is reviewed periodically" (p. 40).

What is less obvious, as your question suggests, is what would happen if the liability cap was raised from $75 million to $10 billion without changes to the financial assurance (insurance) formula. Operators of offshore energy facilities, whether drilling in deepwater or on the shelf, would likely continue to meet their oil spill financial responsibility (OSFR) requirements through self-insurance. The corporate entity itself, however, could become financially liable for up to $10 billion in potential losses and face uncertain reputational risk. In other words, it is possible that oil and gas exploration and production firms could continue to drill but the investors and owners of the firm would be exposed to a higher level of reputational risk or possible insolvency in the event losses exceed the firm's net worth.

Question 5. How many of these companies would be American?

Answer. This question is beyond the scope of the CRS panel's expertise.

Question 6. In your written testimony you highlight three insurance-related risks to raising the liability limit for damages to $10 billion. Is it correct that your testimony suggests that there's some possibility that the rest of the American companies who have been producing safely in the Gulf of Mexico could be squeezed out because of resulting changes to the insurance structure under OPA 90?

Answer. The key issue is not the amended limits of liability for offshore facilities under OPA 90 from $75 million to $10 billion, but whether commercial insurance companies would be able to issue insurance certificates to provide operators of offshore energy facilities in deepwater or shallow water with the evidence of oil spill financial responsibility (OSFR) under OPA. The point is that the energy insurance market has limited financial capacity for pollution. We do not yet know the insurance structure under OPA 90 that would eventually correspond to a new $10 billion liability cap or the extent to which oil companies, both super majors and small independents, would be able to provide alternative security.

Question 7. Are any insurers already adjusting premiums to address increased risk as a result of the Deepwater Horizon incident?

Answer. According to a June 3, 2010, Reuters article, global reinsurers have begun to raise prices for offshore energy-related insurance premiums by 50% following insurance losses from the Deepwater Horizon oil spill in the Gulf of Mexico that are expected to be between $1.4 billion and $3.5 billion.[2] Actual insured losses, and therefore probable premium increases, would have been higher had BP, the operator of the Deepwater Horizon oil rig, purchased liability insurance instead of self-insuring its risk through its captive insurance program.

Moody's Investors Services reported that the Deepwater Horizon incident will have a "meaningful" impact on the market for offshore energy-related insurance coverage, with preliminary reports indicating a 15% to 25% increase in property coverage for rigs operating in shallow waters and up to 50% higher for deepwater rigs. Pricing for offshore energy liability insurance is likely to trend higher as insurers and reinsurers reassess their overall risk exposure from drilling in deep waters in the Gulf of Mexico.

By self insuring the exposure from the Deepwater Horizon incident, the exposure of the commercial reinsurance industry to the event, along with the need for insurers to raise rates, was significantly reduced, according to Moody's Investors Service.[3] Like most major oil companies, BP self insures its oil spill cleanup and containment costs and business interruption exposures through its wholly owned subsidiary captive insurer Jupiter Insurance Ltd.[4] Captive insurance companies are insurance companies set up specifically to finance risk (i.e., retained losses) from a parent group or its customers. Jupiter's business is 95% fronted through AIRCO, a unit of American International Group because under British tax law the company would not be able to write business in the U.S. where BP is active. Jupiter does not purchase any reinsurance protection, but does have a significant capital base, which was about $6 billion at the end of 2009.[5] The captive limits its loss exposure to $700 million per event (approximately 13% of capital and surplus at December 2009) and, at the time of the Deepwater Horizon incident, had established loss reserves to meet its policy limit of $700 million. BP received payment of $700 million for losses from the sinking of the Deepwater Horizon offshore oil drilling rig. According to A. M. Best Company, Jupiter made a profit of $740 million in 2009 and profits are expected to approach $1 billion in 2010.

Question 8. On page 7 of your testimony you stated that "The availability of alternative sources of speedy financial risk, perhaps through catastrophe bonds or energy insurance financial futures and options (meaning derivative financial instruments that securitize insurance risk, turning an insurance policy or reinsurance contract into a security) could provide the added capital needed in the insurance industry to cover the higher liability." These are all highly complex transactions; can you define what you mean by characterizing them as "speedy?" Are these currently practical alternatives for energy companies?

Answer. The term "speedy" was a typographic error. The correct word was "spreading." (See the answer for question # 2.)

Question 9. Can a member of the panel describe the way in which an exploration rig like the Deepwater Horizon obtains financing?

Answer. This question is beyond the scope of the CRS panel's expertise.

Question 10. Can a member of the panel describe the way in which a small exploration rig with very low exploration risks obtains financing relative to a much larger operation?

Answer. This question is beyond the scope of the CRS panel's expertise.

Question 11. Can the panel describe the current state of the energy industry insurance market in the wake of the Deepwater Horizon incident, specifically whether sufficient insurance products even exist to cover an individual operator's potential liability?

Answer. With capacity in the offshore energy insurance market now at about $1.5 billion, there has been uncertainty about offshore facility operator's ability to obtain insurance certificates to demonstrate evidence of financial responsibility under Section 1061 of the OPA. Underlying this issue is the unique low-frequency, high-severity nature of oil spill catastrophe risk exposures and the difficulties insurers and reinsurers have in raising capital to insure such risks.

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[2] Reuters, June, 3, 2010, "Offshore Premia Soar as BP Spill Hits Reinsurers,' June 3, 2010, located at: [http://www.hindustantimes.com/StoryPage/Print/552722.aspx].

[3] Moody's Investors Service, "Moody's Deepwater Horizon Losses Hit Insurers and Reinsurers," June 3, 2010, located at: [http://www.alacrastore.com/research/moodys-global-credit-research-Moody__s__Deepwater__Horizon__Losses__Hit__Insurers__and__Reinsurers-PR__200382__820466266]

[4] On June, 8, 2010, Jupiter's long-term counterparty credit and insurer financial strength rating from Standard and Poor's was downgraded, along with the BP itself due to the operational challenges the firm faces in cleaning up the oil spill in the Gulf of Mexico.

[5] Michael Bradford, Business Insurance, "BP Can Tap Captive for $700 million in Loss of Rig." May 10, 2010, located at [http://www.businessinsurance.com/article/20100509/ISSUE01/305099971] .

Table 1* shows ocean marine global premiums by class for first-party physical damage coverage. Importantly, these figures do not include third-party liability coverage for bodily injury and property damages and clean up and containment of oil spills. These data are not readily available because the main market players are based principally in London and Bermuda and beyond the reach of state insurance regulators. Based on conversations with offshore energy insurance brokers, the estimated total offshore energy property insurance premiums is in the range of $3 to $3.5 billion annually. There is an additional $500 million in third-party liability capacity. Most operators of offshore energy facilities (e.g., MODU) carry about $300 to $500 million of operator extra expense insurance.

In 2009, the offshore energy insurance market experienced surplus capacity due to two main factors. First, mobile offshore drilling units (MODU) rig utilization and, hence, demand for insurance declined sharply in all oil and gas exploration and production areas of the world, but particularly in the Gulf of Mexico because of heightened hurricane activity in 2004, 2005, 2006, and 2008. According to the International Union of Marine Insurance (IUMI), the worldwide rig capacity utilization rate stood at 75% in 2009, down from 88% in 2008.[6] The Gulf of Mexico rig utilization rate was 49%, down from 75% in 2008. Second, the demand for ocean marine insurance has been adversely affected by the global economic downturn, the decline in world trade, and the drop in market price for oil and natural gas.

Despite efforts to improve safety, risk management and loss prevention across the offshore energy business, natural catastrophe risk remains ever present. The 2010 hurricane season is forecast by the National Oceanic and Atmosphere Administration (NOAA) to be intense with 14 to 23 named storms, including 8 to 10 hurricanes, of which 3 to 7 could be major hurricanes in the Atlantic Basin.[7]

Question 12. If insurance is becoming more expensive and less available, and if a $10 billion increase in strict liability for economic damages were to be levied, can the panel speak to whether independent oil and gas companies operating in the Gulf of Mexico are likely to be able to provide any alternative method of financial responsibility such as bonds and lines of credit?

Answer. This question as it relates specifically to independent oil and gas companies operating in the Gulf of Mexico is beyond the scope of the CRS panel's expertise. However, under Section 1016 of the Oil Pollution Act of 1990, oil and gas exploration and production (E&P) leases issued by the U.S. Minerals Management Services for operation in the Gulf of Mexico must establish and maintain oil spill financial responsibility (OSFR) capability to meet their liabilities for the removal costs and damages caused by oil discharges from an offshore facility and associated pipelines.[8] Besides commercial insurance, operators of offshore energy facilities could demonstrate their OSFR in various ways including surety bonds, guarantees, letters of credit and self insurance, but the most common method for most operators of both deepwater and shallow water drilling is by means of an insurance certificate.

It would appear that the cost of insurance is not a major factor for major oil companies, because they will likely continue to self insure their offshore oil and gas exploration risks through wholly owned subsidiary captive insurance companies. Captives are usually organized offshore and outside the reach of government taxing authorities and, therefore, typically pay no taxes on profits and the premiums that the parent pays are tax deductible. In the case of BP, the parent has tapped Jupiter for a discount note (means borrowing against the assets and invest the proceeds) worth about 98% of its $6.6 billion in total assets.[9]

Responses of Rawle O. King to Questions From Senator Sessions

Question 13. Insurance for offshore oil and gas production is purchased to meet the oil spill financial responsibility requirements and to protect a company from the costs associated with a blow-out including-cost to redrill, pollution liability for third-party claims and cleanup, and physical loss of platforms, rigs, and equipment. Who are the main purchasers of this type of liability insurance for offshore drilling? The small to midsize independent or the majors?

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* Table has been retained in committee files.

[6] International Union of Marine Insurance, "PressRelease: Sharp Drop in Offshore Rig Operation in 2009," located at: [http://www.iumi.com/index.cfm?id=7198].

[7] National Oceanic and Atmosphere Administration, "NOAA Expects Busy Atlantic Hurricane Season," May 27, 2010, located at: [http://www.noaanews.noaa.gov/stories2010/20100527__hurricaneoutlook.html].

[8] This requirement applies to the Outer Continental Shelf (OCS), state waters, and certain coastal inland waters.

[9] The Wall Street Journal, "BP Oil Spill Sparks Debate on Captive Insurers," June 9, 2010, located at: [http://blogs.wsj.com/source/2010/06/09/bp-oil-spill-sparks-debate-on-captive-insurers]

Answer. For legal or contractual reasons, all operators of offshore energy facilities purchase some type of marine liability insurance that covers the costs associated with a blow-out including the cost to redrill, pollution liability for third-party claims and cleanup, and physical loss of platforms, rigs, and equipment. Under Section 1016 of Oil Pollution Act of 1990 (OPA), oil and gas exploration and production (E&P) leases issued by the U.S. Minerals Management Services for operation in the Gulf of Mexico must establish and maintain oil spill financial responsibility (OSFR) capability to meet their liabilities for removal costs and damages caused by oil discharges from an offshore facility and associated pipelines.[10] OPA established a $75 million cap on economic damage above which a responsible party is not liable for paying for the costs of an oil spill unless the damages were the result of acts of gross negligence or willful misconduct.[11] A Certificate of Financial Responsibility (COFR) is issued to vessel operators who have demonstrated their ability to pay for cleanup and damage cost up to the liability limits required by the OPA.[12] OSFR is demonstrated in various ways including surety bonds, guarantees, letters of credit and self insurance, but the most common method is by means of an insurance certificate.

I am not able to say with specificity whether small to midsize independent or major oil companies purchase commercial insurance, as this information is considered proprietary. However, it is generally known that the major oil companies typically self insure their offshore energy risks through their wholly owned subsidiary captive insurance and that they indemnify losses through retained corporate earnings. Major oil companies with large operating revenue relative to small to midsize independent oil companies tend to self insure because it does not make economic sense to pay the kind of premiums they would be charged to cover themselves in what is fundamentally a risky business. Small and midsize firms usually purchase coverage through a mutual insurance company like Oil Casualty Insurance Ltd.

Question 14. What is the amount of insurance that is available from the commercial market for third party pollution liability for operators and non-operators before and after the Deepwater Horizon incident?

Answer. While capacity in the offshore energy insurance market before the Deepwater Horizon incident was between $500 million and $1.5 billion worldwide, there is now uncertainty about offshore facility operators' ability to obtain insurance certificates to demonstrate evidence of financial responsibility under Section 1061 of the OPA. Underlying this issue is the unique low-frequency, high-severity nature of oil spill catastrophe risk exposures and the difficulties insurers and reinsurers have in raising capital to insure such risks.

Congress may wish to consider the feasibility of alternatives to traditional insurance and reinsurance products designed to spread catastrophic risk among capital market investors. The development of innovative catastrophe-linked securities and other alternative risk transfer (ART) instruments that transfer income received in the form of insurance premiums to the capital market for their assumption of risk is one proposed alternative to traditional offshore energy insurance and reinsurance.

Question 15. Will insurance be available for offshore production if the liability caps were increased to $10 billion? What would be the impacts on the industry of such increase? Would this only impact very small companies or would larger, American-based international companies be impacted as well?

Answer. We do not have the information on how much it currently costs small independent oil companies to insure against oil spills. The offshore energy insurance market is highly specialized. The limits of insurance needed are so high—in excess of $1 billion in some cases—that no single insurer provides them alone; therefore, it is a common practice for oil and gas operators to obtain insurance on a subscription basis, whereby several insurers each agree to accept a share of the exposure. These subscription transactions are handled by insurance brokers who negotiate with underwriters recognized as specialists in the energy field.

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[10] This requirement applies to the Outer Continental Shelf (OCS), state waters, and certain coastal inland waters.

[11] Lease holders of a covered offshore facility (COF) must demonstrate a minimum amount of OSFR of $35 million per 35,000 barrels of "worst case oil-spill discharge" up to a maximum of $150 million for COF located in the OCS and $10 million in state waters. As an illustration, a worst case oil-spill discharge volume of 35,000 barrels (bbls) requires $35 million in OSFR while a volume of 35,001 bbls requires $70 million. The MMS calculates the worst case oil-spill discharge volume for a facility. An exemption to the OSFR is provided for persons responsible for facilities having a potential worst case oil-spill discharge of 1,000 bbls or less

[12] Federal Register, "U.S. Minerals Management Service, Oil Spill Financial Responsibility for Offshore Facilities," vol. 63, No. 154, Aug. 11, 1998, p. 42699.

The issue is not the liability limit, but whether insurers would offer insurance at the cap or whether they even have enough capacity. Currently, the capacity limit is apparently somewhere between $500 million and $1.5 billion worldwide.

Question 16. Are insurers already adjusting premiums to address increased risk as a result of the Horizon incident?

Answer. According to a June 3, 2010, Reuters article, global reinsurers have begun to raise prices for offshore energy-related insurance premiums by 50% following insurance losses from the Deepwater Horizon oil spill in the Gulf of Mexico that are expected to be between $1.4 billion and $3.5 billion.[13] Actual insured losses, and therefore probable premium increases, would have been higher had BP, the operator of the Deepwater Horizon oil rig, purchased liability insurance instead of self-insuring its risk through its captive insurance program.

Moody's Investors Services reported that the Deepwater Horizon incident will have a "meaningful" impact on the market for offshore energy-related insurance coverage, with preliminary reports indicating a 15% to 25% increase in property coverage for rigs operating in shallow waters and up to 50% higher for deepwater rigs. Pricing for offshore energy liability insurance is likely to trend higher as insurers and reinsurers reassess their overall risk exposure from drilling in deep waters in the Gulf of Mexico.

By BP self insuring the exposure from the Deepwater Horizon incident, the exposure of the commercial reinsurance industry to the event, along with the need for insurers to raise rates, was significantly reduced, according to Moody's Investors Service. Like most major oil companies, BP self insures its oil spill cleanup and containment costs and business interruption exposures through its wholly owned subsidiary captive insurer Jupiter Insurance Ltd. Jupiter's business is 95% fronted through AIRCO, a unit of American International Group because under British tax law the company would not be able to write business in the U.S. where BP is active. Jupiter does not purchase any reinsurance protection, but does have a significant capital base, which was about $6 billion at the end of 2009.[14] The captive limits its loss exposure to $700 million per event (approximately 13% of capital and surplus at December 2009) and, at the time of the Deepwater Horizon incident, had established loss reserves to meet its policy limit of $700 million. BP received payment of $700 million for losses from the sinking of the Deepwater Horizon offshore oil drilling rig. According to A. M. Best Company, Jupiter made a profit of $740 million in 2009 and profits are expected to approach $1 billion in 2010.

Question 17. In your opinion, are there factors that should be considered when assessing strict liability limits? For example: past safety issues/violations, water depths, pressure depths, or natural gas vs. oil production.

Answer. This question is beyond the scope of the CRS panel's expertise.

RESPONSES OF ROBERT METZ TO QUESTIONS FROM MURKOWSKI

On June 7, 2010, the Committee asked CRS to respond to questions pertaining to CRS testimony at a Committee hearing on May 25, 2010. The questions were relayed to CRS in three memoranda, delivered separately to Rawle King, Robert Meltz, and Jonathan Ramseur. Some of the questions in these memoranda were duplicative; others were unique. This memorandum contains responses to four of the questions. My colleagues, Rawle King and Jonathan Ramseur, are submitting separate memoranda to respond to the remaining questions. Your questions, some slightly paraphrased, are indicated below in boldface.

Question 1. Jonathan Ramseur's testimony notes that under Oil Pollution Act section 1001(14), an "incident" means "any occurrence or series of occurrences having the same origin, involving one or more vessels, facilities, or any combination thereof, resulting in the discharge or substantial threat of discharge of oil." The Administration has indicated in several briefings that this definition gives it ample room to define more than one "incident" in order to avoid the $1 billion per incident payout cap on the Oil Spill Liability Trust Fund. Might the Administration be able to define more than one "incident" from the Deepwater Horizon oil spill?

Answer. At this early date, the facts surrounding the Deepwater Horizon spill are not sufficiently well known to venture a definitive answer to your question. Moreover, OPA legislative history sheds little light on the meaning of "incident"—the

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[13] Reuters, June, 3, 2010, "Offshore Premia Soar as BP Spill Hits Reinsurers,", June 3, 2010, located at: [http://www.hindustantimes.com/StoryPage/Print/552722.aspx].

[14] Michael Bradford, Business Insurance, "BP Can Tap Captive for $700 million in Loss of Rig," May 10, 2010, located at [http://www.businessinsurance.com/article/20100509/ISSUE01/305099971].

conference report notes only that the term derives from the House bill,[1] and the House committee report discussing the meaning of "incident" says nothing pertinent to your question.[2]

CRS research reveals only one court decision to opine on the meaning of "incident." In Water Quality Insurance Syndicate v. United States,[3] a federal district court addressed a challenge, brought by the guarantor of a responsible party, to the refusal by the National Pollution Funds Center (NPFC) to reimburse the guarantor under OPA. In denying the claim, the NPFC reasoned that under OPA section 1016(f)(1)(c), reimbursement was required only where "the incident was caused by the willful misconduct of the responsible party," and there was no willful misconduct here. In the process of rejecting the NPFC's finding that there was no "willful misconduct," the court noted:

> An "incident" is defined in the statute as . . . [repeats OPA's definition]. The "incident," therefore, is not the oil spill. Under the plain language of the statute, the incident is what caused the spill. More importantly, the "incident" may be a "series of occurrences" resulting in the oil spill. While the faulty repair of the tow line was part of the series of occurrences that led to the discharge of the oil, the [NPFC] was wrong under the statute to focus on any one occurrence, event or cause as the proximate cause of the spill. It should have looked at the "series of occurrences" or events that together constitute the "incident" that led to the spill.

This quote highlights the fact that the NPFC should "look[] at the 'series of occurrences'," rather than any one occurrence, in defining an OPA "incident. It does not, however, make clear how closely related a group of occurrences must be before they qualify under OPA as a "series of occurrences having the same origin." Thus, CRS must assume that the NPFC retains wide discretion in grouping individual occurrences into one, or more than one, "series of occurrences"—and thus, one or more incidents. If challenged in court, the NPFC's determination as to the number of incidents likely would be reviewed under the Administrative Procedure Act standard of review, generally considered highly deferential to the agency.[4]

Question 2. Your testimony states: "OPA liabilities for removal costs and damages should be kept in context, as they do not exhaust the potential liabilities of parties connected to the Deepwater Horizon spill. For example, Clean Water Act section 311 imposes civil and criminal penalties for oil spills, and the Outer Continental Shelf Lands Act (OCSLA) contains civil and criminal penalties for, among other things, violation of OCS lease terms or the Act and its regulations. In addition, the OCSLA extends the laws of the United States, and the law of the "adjacent state" where not inconsistent with federal law, to the OCS. Thus, for example, there could conceivably be civil or criminal violations of the Endangered Species Act, Marine Mammal Protection Act, or Migratory Bird Treaty Act in connection with the Gulf spill. The Solid Waste Disposal Act also may apply. Finally, OPA specifies that state law "imposing any additional liability or requirements with respect to the discharge of oil or other pollution by oil within such State" is not preempted. A yes or no question: is there a hard statutory limit to the overall amount of money the responsible parties will have to pay for this spill.

Answer. The answer is no. Note that at least as regards BP Exploration & Production, Inc., the entity that may prove the principal responsible party for the Gulf spill, the "no" answer would be clear even without referring to the statutes above: in the event of a spill from an offshore facility, OPA itself places no cap on the removal cost liability of such lessee.[5]

Question 3. Your testimony states: "The retroactive increase [made by S. 3305 in the OPA damages liability cap for offshore facilities] is . . . ikely to be litigated, if at all, as a possible breach of BP's lease contract, an issue this testimony does not reach." Can you speak here to why there might or might not be a breach of contract if a retroactive bill is enacted?

Answer. The argument that S. 3305 constitutes a breach of BP's lease contract closely parallels my testimony on whether the bill raises a Fifth Amendment taking

[1] H.R. Conf. Rep. 101–653 at 101 (1990).

[2] H.R. Rep. 101–242 at 52 (1989).

[3] 522 F. Supp. 2d 220 (D.D.C. 2007).

[4] See, e.g., Bean Dredging LLC v. United States, 2010 WL 1189903 (D.D.C. Mar. 30, 2010) (adopting Administrative Procedure Act standard of review for purposes of reviewing NPFC's denial of reimbursement claim under OPA, and characterizing that standard as "highly deferential").

[5] OPA § 1004(a)(3); 42 U.S.C. § 2704(a)(3).

issue—asking this time whether a BP lease right was "breached" (or repudiated) rather than "taken." As noted in my testimony, the taking argument——

> would focus on the clause in the company's lease stating that "The lease is issued subject to [the Outer Continental Shelf Lands Act, existing regulations thereunder, and certain future regulations thereunder] and all other applicable statutes and regulations." The company might contend that "all other applicable statutes" refers solely to statutes existing when the company entered into its lease—not those, such as S. 3305, enacted later on. There is solid Supreme Court support for this interpretation: in 2000, the Court interpreted the same "catchall" language in another Outer Continental Shelf lease to "include only statutes and regulations already existing at the time of the contract . . . " Mobil Oil Exploration & Producing Southeast, Inc. v. United States, 530 U.S. 604, 616 (2000). The argument would conclude that "all other applicable statutes" embraces the current $75 million cap in OPA, which S. 3305 abrogates.

Based on the last sentence in the quote, the critical issue for whether S. 3305 effects a breach (or repudiation) of a lease term is this: does the Supreme Court's holding in Mobil Oil that "all applicable statutes" includes only statutes existing when the lease was signed necessarily mean that any later-enacted statute violates the lease contract? In both Mobil Oil and another, quite similar case,[6] the later-enacted statute found to effect a repudiation of the lease contract by the United States was one that directly related to the federal leasing process itself. Thus, there remains latitude to argue that notwithstanding these decisions, some statutes enacted after a lease is signed—those not directly impinging on matters addressed in the lease or the OCSLA—do not violate prior leases. This proposition seems compelling, in that surely an oil company with an OCS lease is not immune from all changes in federal law—tax laws, occupational safety laws, employee pension plan laws, etc.—during the duration of its lease. Accepting this proposition, only one question remains: on which side of the line between the post-lease-signing laws found unacceptable by the courts and those just suggested as acceptable (tax laws, etc.) does an increase in an offshore facility's liability cap fall? CRS can say only that there are plausible arguments on both sides of this issue.

RESPONSE OF ROBERT METZ TO QUESTION FROM SENATOR SESSION

Question 4. hat are the constitutional or breach of contract issues in holding a responsible party retroactively liable? Is there procedure to allow retroactive legislation?

Answer. The constitutional provisions implicated when a statute applies retroactively are set out in my testimony. As there explained, five constitutional provisions are potentially involved as a general matter: the Takings Clause, substantive due process, Bill of Attainder Clause, Impairment of Contracts Clause, and Ex Post Facto Clause. CRS refers to the testimony for further explication of the limits on each of these provisions' applicability and how those limits apply to holding an OPA responsible party retroactively liable. As for the breach of lease contract issues raised by holding an OPA responsible party retroactively liable, these are addressed under question 3 as they relate to a retroactive increase in the $75 million liability cap for damages caused by offshore facilities under existing leases.

CRS interprets your second question, asking whether there is any "procedure to allow retroactive legislation," to refer to congressional procedure leading up to the enactment of such legislation. We are unaware of any congressional procedure whose use is required or otherwise allowed specifically because a piece of legislation (other than tax legislation) is retroactive, nor any congressional procedure whose use would affect how the courts would address challenges to the ultimately enacted retroactive legislation.

RESPONSES OF THOMAS J. PERRELLI TO QUESTIONS FROM SENATOR MURKOWSKI

Question 1. The Oil Pollution Act provides that a responsible party is strictly liable for $75 million in economic damages. This means there are very limited defenses to that level of liability. Can a responsible party be held liable, but not strictly liable, for a greater amount than the $75 million but have some defenses?

Answer. The Oil Pollution Act (OPA) imposes strict liability on responsible parties for removal costs and damages related to discharges of oil or substantial threats

[6] Amber Resources Co. v. United States, 538 F.3d 1358 (Fed. Cir. 2008).

ofdischarge in the waters of the United States, adjoining shorelines, or the exclusive economic zone. Question I refers to "$75 million," which is the applicable limitation on liability for damages for offshore facilities under OPA Section 1004(a)(3). OPA Section 1004(c)(1) provides that this limitation will not apply, and thus liability for damages will be unlimited, ifthe incident was caused by the responsible parties' gross negligence, willful misconduct, or by the violation of an applicable federal safety, construction, or operating regulation. Section 1004(c)(2) of OPA provides that the limitation also will not apply if the responsible party fails to report an incident as required by law, fails to cooperate as requested in connection with removal activities, or fails to follow an order issued under Section 311(c) or (e) ofthe Federal Water Pollution Control Act, commonly known as the Clean Water Act, or the Intervention on the High Seas Act. Under OPA Section 1004(a)(3), liability for removal costs for offshore facilities is unlimited.

Question 2. To what extent does the Oil Spill Liability Trust Fund serve as an insurance policy for companies operating in the OCS, so that while each one mayor may not be personally capable of paying for all the costs of a huge spill, the entire industry has funded an insurance policy to protect victims and taxpayers?

Answer. The Oil Spill Liability Trust Fund (OSLTF) is a fund established under 26 U.S.C. § 9509 and managed by the National Pollution Funds Center, an agency ofthe U.S. Coast Guard. The OSLTF is funded by various sources, including by a tax on petroleum and by penalties paid under several statutes, including certain provisions of the Clean Water Act. Under OPA Section 1002(a), each responsible party, and not the OSLTF, is liable to pay the costs and damages that result from incidents for which they are responsible. Pursuant to 26 U.S.C. § 9509(c) and OPA Section 1012, the OSLTF may be used to pay for, among other things, removal costs determined by the President to be consistent with the National Contingency Plan and damages that are not paid directly by a responsible party in accordance with OPA Section 1013. The Fund currently has a per incident limit of $1 billion, making it insufficient to provide a backstop for major disasters ofthe magnitude of the Deepwater Horizon disaster.

Question 3. Does the Department ofJustice have a position on what the dollar amount should be, if any, regarding increases in the strict liability limit of$75 million for economic damages in the OPA '90 context?

Answer. The Administration supports removing the cap on liability for damages for offshore facilities. Removal ofthe cap will promote investment in safety and eliminate an implicit subsidy ofthe oil and gas industry.

Question 4. Is the Department ofJustice aware of any instance, alleged or proven, of the responsible parties for the Deepwater Horizon spill engaging in gross negligence, willful misconduct, or regulatory noncompliance?

Answer. The Attorney General has confirmed that the Department is conducting civil and criminal investigations ofthe events surrounding the Deepwater Horizon explosion and resulting oil spill. The Department will conduct a full and thorough evaluation of all potential violations oflaw and will pursue any violations to the fullest extent of the law.

RESPONSES OF THOMAS J. PERRELLI TO QUESTIONS FROM SENATOR SESSIONS

Question 1. Are the current levels offinancial responsibility sufficient in a worst case scenario situation for drilling on the OCS?

Answer. Under OPA Section 1016 and the Department ofthe Interior regulations, a responsible party for an offshore facility must establish and maintain evidence of financial responsibility for that party's liability under the law. Under OPA Section 1016, such amounts for offshore facilities are currently set between $35 million and $150 million. The Deepwater Horizon oil spill response effort already has required the expenditure offunds far in excess ofthese amounts. The Administration supports increasing the required amount of financial responsibility for offshore facilities.

Question 2. In your opinion, do the current liability caps need to be increased?

Answer. Yes. The Administration supports removing the cap on liability for damages for offshore facilities. Removal ofthe cap will promote investment in safety and eliminate an implicit subsidy of the oil and gas industry.

Question 3. What are the Constitutional or breach of contract issues in holding a responsible party retroactively liable? Is there procedure to allow retroactive legislation?

Answer. It is not uncommon for Congress to legislate retroactively, and such legislation is often upheld as long as it is justified by a rational legislative purpose. Congress must, however, make clear its intention to legislate retroactively. An example ofsuch legislation in the environmental context is the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), commonly known as Superfund. CERCLA, which retroactively provided liability for releases of hazardous waste, has repeatedly been up held by the courts. If Congress were to retroactively increase the limitations on liability under OPA, the Department believes that it would have strong arguments that Congress, in legislating to ensure that there are sufficient funds for cleanup and compensation, would not run afoul ofconstitutional protections. In addition, an increased liability cap would only be retroactive in a narrow range of circumstances: when the oil discharge occurred prior to the enactment ofthe legislation raising the cap and when the exceptions to the existing limitations on liability did not apply.

As to possible breach-of-contract issues, we recognize that there is litigation risk associated with increasing the limitations on liability retroactively, but we believe that the United States would have substantial defenses to such claims. We welcome the opportunity to work with Congress to address the issues associated with the legislative proposals that have retroactive application.

RESPONSES OF JONATHAN RAMSEUR TO QUESTIONS FROM MURKOWSKI

Question 1. Your testimony indicates that the Oil Spill Liability Trust Fund is vulnerable to depletion and I think we are witnessing that now. Let's presume the fund were many times its current level, at around $10 billion. To be clear, what are the categories of costs associated with an oil spill which cannot be covered by the trust fund?

Answer. OPA does not explicitly exclude certain categories of costs (or damages) that the Oil Spill Liability Trust Fund (OSLTF) could address. However, OPA Section 1012 (33 U.S.C. 2712—"Uses of the Fund") lists specific applications of the Fund that "shall be available to the President." The most pertinent available applications in the context of your question include the following:

- payment of removal costs, including the monitoring of removal action;
- payment of the costs incurred by the federal and state trustees of natural resources for assessing the injuries to natural resources caused by an oil spill, and developing and implementing the plans to restore or replace the injured natural resources; and
- payment of claims for uncompensated removal costs or uncompensated damages.

The term "damages" is defined in OPA Section 1001 (33 U.S.C. 2701) as the damages specified in Section 1002(b) (33 U.S.C. 2702(b)) and includes the cost of assessing these damages.

The damages in 1002(b) include the following:

(A) Natural resources—Damages for injury to, destruction of, loss of, or loss of use of, natural resources, including the reasonable costs of assessing the damage, which shall be recoverable by a United States trustee, a State trustee, an Indian tribe trustee, or a foreign trustee.

(B) Real or personal property—Damages for injury to, or economic losses resulting from destruction of, real or personal property, which shall be recoverable by a claimant who owns or leases that property.

(C) Subsistence use—Damages for loss of subsistence use of natural resources, which shall be recoverable by any claimant who so uses natural resources which have been injured, destroyed, or lost, without regard to the ownership or management of the resources.

(D) Revenues—Damages equal to the net loss of taxes, royalties, rents, fees, or net profit shares due to the injury, destruction, or loss of real property, personal property, or natural resources, which shall be recoverable by the Government of the United States, a State, or a political subdivision thereof.

(E) Profits and earning capacity—Damages equal to the loss of profits or impairment of earning capacity due to the injury, destruction, or loss of real property, personal property, or natural resources, which shall be recoverable by any claimant.[1]

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[1] Statements in OPA's legislative history indicates that a "claimant need not be the owner of the damaged property or resources to recover for lost profits or income. For example, a fisherman may recover lost income due to damaged fisheries resources, even though the fisherman does not own the resources" (U.S. Congress, Conference Report accompanying H.R. 1465, Oil Pollution Act of 1990, 1990, Conf. Rept. 101-653, 101st Cong., 2nd session). In another identified example, "a worker at a coastal hotel might have standing to bring a claim for damages even though he owns no property which has been injured as a result of the discharge of oil" (U.S. Congress, House Committee on Merchant Marine and Fisheries, Report accompanying H.R.

(F) Public services—Damages for net costs of providing increased or additional public services during or after removal activities, including protection from fire, safety, or health hazards, caused by a discharge of oil, which shall be recoverable by a State, or a political subdivision of a State.

Although it would be impossible to provide an exhaustive list of the costs/damages that the OSLTF does not address, two categories that may be of interest are claims involving individual health effects and punitive damages. Claims regarding individual health effects (acute or chronic) related to the spill are not specifically addressed in Section 1002, nor are they specifically excluded. However, documents from OPA's legislative history suggest that individual health effects were not considered to be a part of the liability framework during OPA's creation.[2]

In addition, OPA does not expressly prohibit the recovery of punitive damages against a responsible party, but some courts have considered the issue and held that punitive damages are not recoverable under OPA.[3]

Congress did not intend for OPA's liability and compensation framework to cover all costs and damages. As stated in the Senate Report from OPA's legislative history: "while setting a Federal liability standard and stating what damages are compensable, these provisions do not preclude States from adopting different standards or definitions of damages."[4]. Additional statements from OPA drafters indicate that state laws and analogous state trust funds would supplement (if necessary) the federal liability framework under OPA.[5]

Question 2. Would increasing the per-incident limit on expenditures increase protection of coastal residents from the economic impacts of an oil spill?

Answer. The OSLTF managers are limited in the amount of payments that may be awarded for each incident.[6] Under current law, this per-incident cap is $1 billion. Increasing the per-incident cap would reduce the risk that parties (private citizens and governments) would not be fully compensated for losses associated with an oil spill.

Answer. Statements from OPA's legislative history suggest that drafters intended the fund to cover "catastrophic spills."[7]. However, $1 billion today does not have the same value as it did in 1990, when OPA was enacted. Although OPA requires the President to issue regulations to adjust liability limits at least every three years,[8] an analogous provision for the per-incident cap does not exist. As a point of reference, if the $1 billion figure had been adjusted for inflation, it would be approximately $1.6 billion in today's dollars.

The Administration and Members have offered legislative proposals that would increase the per-incident cap. For example, the Administration submitted a proposal to raise the cap to $1.5 billion.[9] The version of H.R. 4213 (the American Jobs and Closing Tax Loopholes Act of 2010) that passed the House May 28, 2010, would raise the per-incident cap to $5 billion.[10] As of June 17, 2010, the Senate was considering this legislation and Senators have offered several oil-spill-related amendments to this legislation.

1465, Oil Pollution Prevention, Removal, Liability, and Compensation Act of 1989, 1989, H.Rept. 101-242, Part 2, 101st Cong., 1st session).

[2] See e.g., Clifton Curtis (Oceanic Society), Testimony before the Subcommittee on Coast Guard and Navigation of the House Committee on Merchant Marine and Fisheries Concerning Oil Pollution Liability and Compensation Legislation, May 11, 1989.

[3] See South Port Marine, LLC v. Gulf Oil, LP, 234 F.3d 58 (1st Cir. 2000) (OPA displaces maritime-law punitive damages); Clausen v. M/V New Carissa, 171 F. Supp. 2d 1127 (D. Or. 2003) (OPA provides exclusive federal remedy for property damage claims resulting from oil spill, and thus precludes award of punitive damages for any claim for which the act could provide relief).

[4] U.S. Congress, Senate Committee on Environment and Public Works, Report accompanying S. 686, Oil Pollution Liability and Compensation Act of 1989, 1989, S.Rept. 101-94, 101st Cong., 1st session.

[5] See George Mitchell, "Preservation of State and Federal Authority under the Oil Pollution Act of 1990," Environmental Law, Vol. 21, no. 2 (1991).

[6] "Incident" means any occurrence or series of occurrences having the same origin, involving one or more vessels, facilities, or any combination thereof, resulting in the discharge or substantial threat of discharge of oil. 33 U.S.C. 2701(14).

[7] U.S. Congress, House Committee on Merchant Marine and Fisheries, Report accompanying H.R. 1465, Oil Pollution Prevention, Removal, Liability, and Compensation Act of 1989, 1989, H.Rept. 101-242, Part 2, 101st Cong., 1st sess., p. 36.

[8] 33 USC 2704(d)(4).

[9] The Administration submitted its request for supplemental appropriations to respond to the Deepwater Horizon oil spill in the Gulf of Mexico in a budget amendment on May 12, 2010 (OMB, "Oil Spill Request;" at www.whitehouse.gov/omb/assets/budget—amendments/supplemental—05—12—10.pdf.)

[10] See note 52 supra.

In addition, on June 16, 2010, the President announced that BP has agreed to set aside $20 billion to pay economic damage claims to people and businesses that have been affected by the oil spill. Although this development may render the per-incident cap a moot issue for the 2010 Gulf spill, a subsequent catastrophic spill could threaten the current per-incident cap threshold. As a reference point, the 1989 Exxon Valdez spill tallied approximately $2 billion in cleanup costs and $1 billion in natural resource damages in 1990 dollars. These combined figures equate to approximately $5 billion in today's dollars and would not include the wider array of claims for which responsible parties are now liable.

Question 3. Can a member of the panel describe the way in which an exploration rig like the Deepwater Horizon obtains financing?

Answer. This question is beyond the scope of the CRS panel's expertise.

RESPONSES OF JONATHAN RAMSEUR TO QUESTIONS FROM SENATOR SESSIONS

Question 1. In your opinion, are there factors that should be considered when assessing strict liability limits? For example: past safety issues/violations, water depths, pressure depths, or natural gas vs. oil production.

Answer. Precedent exists in OPA for setting different liability limits to account for different oil spill risks. In particular, the liability limit for single-hulled tank vessels ($3,200 per gross ton) is approximately 50% higher than for double-hulled vessels ($2,000 per gross ton).[11] A 1998 study from the National Research Council concluded: "in the event of an accident involving a collision or grounding, an effectively designed double-hull tanker will significantly reduce the expected outflow of oil compared to that from a single-hull vessel..complete conversion of the maritime oil transportation fleet to double hulls will significantly improve protection of the marine environment."[12]

In the outer continental shelf (OCS) oil exploration and development sector, policymakers may consider a wide array of factors that could influence (1) the risk of an oil spill occurring and (2) the risk that the oil spill could not be contained before impacting sensitive ecosystems and/or affecting large populations. Policymakers could then structure the liability limit framework based on certain behavior, the use of specific technologies, and/or the location of the activity. However, CRS is not aware of a comprehensive risk assessment of individual factors (or their combinations) regarding OCS drilling activities. A rigorous analysis of possible risk factors would be instructive to policymakers. With these caveats in mind, examples of potential factors may include:[13]

Technological factors

- ability to use human-operated submarines to fix a blowout preventer or install containment devices
- relief wells drilled and ready to plug an uncontained well
- acoustic switch for the blowout preventer

Geographic factors

- water depth
- risk of spill near environmentally-sensitive areas
- risk of spill near economically-sensitive areas

Geologic factors

- gas reservoirs versus oil reservoirs
- prevalence of methane hydrates

Company-specific factors

- a company's safety record or compliance record
- foreign versus U.S. ownership
- company size or recent profits

These factors can be related. For instance, water depth influences the use of human-operated submarines and the formation of methane hydrates. Moreover,

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[11] This distinction was not made in OPA when it was enacted, but was added by the Coast Guard and Maritime Transportation Act of 2006 (P.L. 109-241). The Coast Guard further increased the limits through a rulemaking in 2009. See U.S. Coast Guard, "Consumer Price Index Adjustments of Oil Pollution Act of 1990 Limits of Liability-Vessels and Deepwater Ports," Federal Register Volume 74, No. 125 (July 1, 2009), pp. 31357-31369.

[12] National Research Council, Double-Hull Tanker Legislation: An Assessment of the Oil Pollution Act of 1990, National Academy Press, 1998.

[13] For more information, see CRS Report R41262, Deepwater Horizon Oil Spill: Selected Issues for Congress, coordinated by Curry L. Hagerty and Jonathan L. Ramseur.

deep water and ultradeep water drilling technologies must be built to withstand the harsher conditions of greater water depths. Necessary technologies for these depths are complicated, difficult to repair, and expensive. However, two oil well blowouts of note-the 1979 Ixtoc in Mexican Gulf waters and the 2009 West Atlas off the West Australia coast-occurred in relatively shallow water depths. Both of these wells were ultimately contained-290 and 105 days later, respectively-by pumping mud into geologically linked wells (similar to the relief well strategy being employed in the Gulf of Mexico).

The Deepwater Horizon incident has brought considerable scrutiny to deepwater activities and their challenges. On May 27, 2010, the Administration called for a 6-month moratorium on deepwater drilling. However, some stakeholders have filed suit against the federal government for this decision.[14]

Stark distinctions in oil transportation design technology (double-hull versus single-hull) may not have an analogue in the oil exploration and development sector. Determining a similar distinction would likely require a comprehensive analysis of the causes of oil spills resulting from oil exploration and development activities. Congress is not required to wait for a wide-ranging analysis before altering the liability structure, but a revised structure could yield unintended (and unforeseen) consequences. Potential consequences from a revised liability structure could compete with or contravene other policy objectives.

Question 2. Are the current levels of financial responsibility sufficient in a worst case scenario situation for drilling on the OCS?

Answer. The following response addresses this question as well as the subsequent question: "In your opinion, do the current liability caps need to be increased?"

Answer. The current levels of financial responsibility are related to the current liability limits for various sources (e.g., vessels, offshore facilities) of potential oil spills. The liability limits differ by potential source. In the case of vessels, whose liability limits are a single dollar amount encompassing both removal costs and other damages, the financial responsibility levels are directly tied to the corresponding liability caps. Current law requires responsible parties for vessels to demonstrate the "maximum amount of liability to which the responsible party could be subjected under [the liability limits in OPA Section 1004; 33 U.S.C. 2704]."

In comparison, offshore facilities, like the Gulf well leased to British Petroleum, have their liability capped at "all removal costs plus $75 million." Because the structure of this liability limit is different than vessels, the corresponding financial responsibility limit provisions differ as well. Responsible parties for offshore facilities in federal waters must demonstrate $35 million financial responsibility, unless the President determines a greater amount (not to exceed $150 million) is justified (33 U.S.C. 2716(c)). The federal regulations that are authored by this statutory provision (30 CFR Part 254) base the financial responsibility amount-between $35 million and $150 million-on a facility's worst-case discharge volume (as defined in 30 CFR Section 253.14). For example, a facility with a worst-case discharge volume over 105,000 barrels[15]—the highest level of worst-case discharge listed in the regulations-must maintain $150 million in financial responsibility.

Although OPA requires the President to issue regulations to adjust the liability limits at least every three years to take into account changes in the consumer price index (CPI),[16] offshore facility limits have remained at the same level since 1990. Pursuant to the Coast Guard and Maritime Transportation Act of 2006 (P.L. 109-241) Congress increased limits to double-and single-hulled vessels.[17] Subsequently, the Coast Guard made its first CPI adjustment to the liability limits in 2009.[18] According to the Federal Register preamble (July 1, 2009), the Coast Guard will join with the other relevant agencies-Environmental Protection Agency, Department of the Interior, and Department of Transportation-to submit CPI adjustments together in 2012. Thus, the first adjustment for offshore facilities' liability limits is scheduled for 2012-22 years after the passage of OPA.

If offshore facility liability limits had been adjusted every three years since 1990, the liability limit would be approximately $124 million (plus all removal costs). Un-

[14] Associated Press, "Judge to hear bid to overturn halt on drilling," June 21, 2010.

[15] This amount is significantly less than the estimated (30,000 to 60,000 barrels per day) to have been released to date. See National Incident Command's Flow Rate Technical Group, Press Release, June 15, 2010.

[16] 33 USC 2704(d)(4).

[17] This act increased limits to $1,900/gross ton for double-hulled vessels and $3,000/gross ton for single-hulled vessels.

[18] This rulemaking increased the limits to $2,000 for double-hulls and $3,200 for single-hulls. U.S. Coast Guard, "Consumer Price Index Adjustments of Oil Pollution Act of 1990 Limits of Liability-Vessels and Deepwater Ports," Federal Register Volume 74, No. 125 (July 1, 2009), pp. 31357-31369.

like vessels, an increase in the offshore facility liability limit would not trigger a corresponding increase in the financial responsibility level. (As a point of reference, the $150 million maximum financial responsibility level, which was established in 1990, would be approximately $250 million today if adjusted for inflation.) Altering the $150 million figure would require Congressional action.

Your question asks for an evaluation of whether the financial responsibility limits are "sufficient." As discussed above, this question is effectively also seeking an evaluation of the liability limits. However, the question of "sufficiency" may be applied in different contexts. One context may involve whether the financial demonstration/liability limits are "sufficient" to protect the viability of the OSLTF.

The liability and compensation framework established by OPA assigns the primary burden of paying for oil spills to responsible parties. To cover costs/damages above individual liability limits, Congress established the OSLTF. This fund is financed primarily through a tax on the oil industry. From one perspective, the OSLTF acts as an insurance pool that is supplied by the industry that profits from oil markets. As mentioned above, Congress intended the OSLTF to serve as a backstop, which would be able to compensate for losses resulting from a catastrophic oil spill.

A 2007 GAO report examined occurrences of liability limits being exceeded and resulting trust fund vulnerability. Although the report only assessed vessel incidents, the findings may be instructive. GAO found:

> Major oil spills that exceed a vessel's limit of liability are infrequent, but their effect on the Fund can be significant. In our 2007 report, we reported that 10 of the 51 major oil spills that occurred from 1990 through 2006 resulted in limit-of-liability claims on the Fund.[19]

Another evaluation may involve whether the financial demonstration/liability limits, combined with the backstop of the OSLTF and its per-incident cap, are "sufficient" to address damages/costs associated with oil spills that may occur in U.S. waters. Although the 10 spills identified by GAO's 2007 report impacted the OSLTF, the per-incident cap was not a pressing issue and the viability of the fund was not threatened by these spills. Thus, one could argue that OPA's individual liability and trust fund framework has been sufficient to address all spills that have occurred since the 1989 Exxon Valdez. On the other hand, one could argue that fund was particularly vulnerable at periods during the past two decades. For instance, prior to two separate actions by the 109th Congress, fund managers projected the fund would be completely depleted by FY2009. In FY2006, the trust fund balance was approximately $600 million, and managers were concerned that one costly accidental could deplete the fund entirely. During this time period, the $1 billion per-incident cap was less of an issue.

The current combination of liability limits and $1 billion per-incident cap is not sufficient to withstand a spill with damages/costs that exceed the liability limit (assuming it would apply) by $1 billion. Historically, such spills have been rare. The United States has not encountered a spill comparable to the current Gulf spill since the 1989 Valdez. However, if the Valdez were to occur today, its costs would exceed the $1 billion threshold several times over (assuming the responsible party's liability limits were applied). The Exxon Valdez spill tallied approximately $2 billion in cleanup costs and $1 billion in natural resource damages in 1990 dollars. These combined figures equate to approximately $5 billion in today's dollars and would not include the wider array of claims for which responsible parties are now liable. As the 2010 Gulf spill continues, with a magnitude eclipsing the Valdez spill several times over, the adequacy of the liability and compensation framework has received considerable scrutiny.

These issues and concerns highlight a central policy debate: how should policymakers allocate the costs associated with a catastrophic oil spill (assuming liability limits would apply)? What share of costs should be borne by the responsible party (e.g., oil vessel owner/operators) compared to other groups, such as the oil industry (e.g., through the per-barrel tax), and/or the general treasury (assuming Congress would appropriate funds to compensate for unpaid costs/damages)? In addition, what role should state laws play? OPA does not preempt states from imposing additional liability or requirements relating to oil spills. Drafters expected that state laws and analogous state trust funds could supplement (if necessary) the federal liability framework under OPA. However, pursuing legal remedies outside of the OPA framework may require extensive litigation for claimants.

[19] GAO, Oil Spills: Cost of Major Spills May Impact Viability of Oil Spill Liability Trust Fund, (updating a 2007 study) June 16, 2010.

As mentioned above, the liability limit and financial responsibility demonstration for offshore facilities are the same figures they were in 1990. Thus, due to inflation, the responsible party shares less of the potential cost today than it did in 1990. Restoring the 1990 OPA cost-sharing ratio would require an inflation adjustment in the offshore facility liability limits (to $124 million plus removal costs), financial responsibility demonstration (to $250 million), and the per-incident cap for the OSLTF (to $1.6 billion). Although it is too early to accurately assess whether these revised figures would be sufficient to provide compensation and address the impacts from the current spill, many observers estimate and proposed legislation indicates that these figures would be inadequate.[20]

Question 3. In your opinion, do the current liability caps need to be increased?

Answer. See response to the above question.

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[20] Recent legislative proposals offer some indication of obervers' expectations of potential costs. For example, the Administration proposed to raise the cap to $1.5 billion. The version of H.R. 4213 (the American Jobs and Closing Tax Loopholes Act of 2010) that passed the House May 28, 2010, would raise the per-incident cap to $5 billion. S. 3305 (Menendez) would raise the offshore facility liability limit to $10 billion; S. 3472 (Menendez) would remove the liability cap entirely. Further, on June 16, 2010, the President announced that BP has agreed to set aside $20 billion to pay economic damage claims to people and businesses that have been affected by the oil spill.